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No.

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In The

Supreme Court of the United States

October Term, 1985

PATRICK W. SIMMONS,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN J. NAUGHTON
30 North LaSalle St. - Room 2100
Chicago, IL 60602

GORDON P. MacDOUGALL
(Counsel of Record)
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 223-9738

Attorneys for Petitioner

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QUESTION PRESENTED

Whether the Interstate Commerce Commission is authorized to impose employee protective conditions for the benefit of employees of either the abandoning or acquiring railroad, when it finds under 49 U.S.C. 10903 that public convenience and necessity permit abandonment of a line of railroad, and thereupon approves transfer of the line to another person under section 10905 for continued rail operation, and dismisses the abandonment application.

PARTIES TO THE PROCEEDINGS

The following parties appeared in the proceedings before the Court of Appeals below:

Patrick W. Simmons (United Transportation Union)
Interstate Commerce Commission
United States of America
Illinois Central Gulf Railroad Company
Cisco Cooperative Grain Company

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PATRICK W. SIMMONS,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Patrick W. Simmons,[1] prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on March 15, 1985, May 2, 1985, and July 15, 1985.[2]

OPINIONS BELOW

The amended opinion of the court of appeals in the *"Simmons I"* case (App. 1a) is reported at 760 F.2d 126 (1985), and the opinion in the *"Simmons II"* case (App. 13a) is reported at 766 F.2d 1177 (1985). The principal deci-

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[1]Illinois Legislative Director for United Transportation Union.

[2]This petition for certiorari embraces two cases that involve identical or closely related questions. Rule 19.4

sion of the Interstate Commerce Commission (App. 26a) is reported at 366 I.C.C. 911 (1983).

JURISDICTION

The judgments of the court of appeals in the two cases (App. 11a and App. 23a) were entered March 15, 1985 and July 15, 1985, respectively.

The petitioner's timely petition for rehearing for the March 15, 1985 decision (*"Simmons I"*) was denied May 2, 1985, and the opinion was amended on May 2, 1985. (App. 12a). On July 11, 1985, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to August 30, 1985, and on August 21, 1985 further extended the time to September 14, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a)

STATUTES INVOLVED

The statutory provisions primarily involved, 49 U.S.C. 10903 and 10905(c)-(f)(2) (1976 ed., Supp. V), are set forth at App. 55, *infra.*

STATEMENT

The court of appeals in these two cases has vitiated a fundamental provision of railroad abandonment law — that the Interstate Commerce Commission ("I.C.C.") is empowered to impose employee protective conditions when it authorizes a rail carrier to terminate service on a line and to transfer the line to another person for continued operation of rail service. The court of appeals in holding the I.C.C. no longer has authority to impose employee protection in such situations, stated its ruling in-

volves "a question of first impression." 760 F.2d at 128 (App. 1a).

1. **1980 Amendment to 49 U.S.C. 10905.** Congress in 1976 made provision for the voluntary sale of a line approved for abandonment to another operator. Accordingly, after the I.C.C. found that public convenience and necessity warrant abandonment, the filing of an offer to acquire the line could result in a 6-month postponement of the abandonment to permit negotiations. P.L. 94-210, 90 Stat. 129 (1976). 49 U.S.C. 1a(6) (1976 ed.), codified in 1978 at 49 U.S.C. 10903. P.L. 95-473, 92 Stat. 1405-6 (1978).

The I.C.C.'s regulations issued under the 1976 legislation provided that if a voluntary purchase agreement is executed, the abandonment certificate is issued, and an application to acquire the line is processed. *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 129 and 354 I.C.C. 252, 270 (1976); 49 CFR 1121.38(j) (1977 ed. thru 1980 ed.). Thus, employee protection was accorded to the same extent as normally would be applied in an abandonment or acquisition proceeding.

This Court has tracked the changes made in 49 U.S.C. 10905 brought about by the 1980 amendments to section 10905. *Hayfield Northern R.* v. *Chicago and N.W. Transp.*, ____ U.S. ____, 104 S.Ct. 2610, 81 L.Ed 2d 527 (1984). See also *Chicago and North Western Transp. Co.* v. *U.S.*, 678 F.2d 665 (7th Cir. 1982); *Casenote*, 13 Transp. L. Journ. 245 (1984). There is nothing in the legislative history of the 1980 amendments to section 10905, which were part of Staggers Rail Act of 1980, P.L. 96-448, Section 402, 94 Stat. 1942-45 (1980), to suggest that Congress intended to change the handling of employee protection in section 10905 proceedings.

Likewise, there is nothing in this Court's *Hayfield Northern* opinion to suggest that traditional employee protection imposed in an abandonment proceeding is to be taken away from adversely affected employees when the line is then sold to another operator.

2. **Davis-Elco Line segment.** In the administrative proceedings below, the I.C.C. on March 1,1983 approved an application by Illinois Central Gulf Railroad Company ("ICG") to abandon an 18-mile line of railroad between Davis and Elco, Illinois. The I.C.C.'s approval, made pursuant to 49 U.S.C. 10903, was issued subject to the standard employee protection conditions, currenty set forth in *Oregon Short Line R. Co.-Abandonment-Goshen,* 360 I.C.C. 91 (1979) (App. 26a). Employee protective conditions in abandonment cases are mandatory by the terms of 49 U.S.C. 10903(b)(2):[3]

> On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

During the period between the Administrative Law Judge's ("ALJ") initial approval of the abandonment, and final I.C.C. affirmance, a nearby local short-line rail carrier, Cairo Terminal Railroad Company ("CTRC"), made an offer to purchase a 17.5-mile segment of the line from ICG. Negotiations between ICG and CTRC were success-

[3]Section 10903 is set forth, *infra,* App. 55.

ful, and the parties advised the I.C.C. they had come to terms for CTRC to acquire the 17.5-mile segment. The agreement also provided that I.C.C. approval would be sought for CTRC to acquire trackage rights over a 4.5-mile segment of ICG's line between Davis and Cairo, to enable CTRC to connect its Davis-Elco line with its other operations in the Cairo, Illinois area, and that a connecting track between ICG and CTRC would be constructed near Cairo. The I.C.C. on March 3, 1983, authorized CTRC to acquire the 17.5-mile line segment pursuant to 49 U.S.C. 10905, and dismissed ICG's section 10903 abandonment application for that 17.5-mile segment. (App. 24a-25a). Section 10905 provides that after the I.C.C. approves an abandonment under section 10903, persons may offer to purchase the line, and such offer by a financially responsible person will postpone the issuance of an abandonment certificate pending negotiations. If the parties subsequently enter into an agreement which will provide continued rail service, the I.C.C. "shall approve the transaction and dismiss the application for abandonment . . . ." 49 U.S.C. 10905(e).[4]

The I.C.C. subsequently approved CTRC request for trackage rights, and for construction of the CTRC-ICG connecting track. (App. 33a, 43a).[5]

The I.C.C. ruled that the employee protective conditions which it had imposed for ICG employees in its decision approving ICG's termination of service on 17.5 miles of the 18-mile line, would be taken away when CTRC acquired the 17.5-mile segment. *Illinois Central Gulf R. Co.-Abandonment,* 366 I.C.C. 911 (1983) (App. 26a).

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[4]Section 10905(c)-(f)(2) is set forth, *infra,* 56a.

[5]Technically, the I.C.C. exempted the transactions from prior approval requirements. See: 49 U.S.C. 10505.

The I.C.C. reasoned that it would not impose labor protective conditions upon a carrier terminating service in a financial assistant proceeding growing out of an abandonment approval because the applicable statutes neither require nor permit the I.C.C. to do so. 366 I.C.C. at 912 (App. 28a):

> While UTU has sought the imposition of the *New York Dock* conditions, our discussion here concerns whether any labor protection conditions are warranted in proceedings under 49 U.S.C. 10905.
>
> We will not impose protective conditions in financial assistance proceedings because the applicable statutes neither require nor permit us to do so.

However, the I.C.C. did impose the standard employee protective conditions in authorizing CTRC to operate by trackage rights over 4.5 miles of ICG line, in the related but separate proceeding. Finance Docket No. 30138, *Cairo Terminal Railroad Company-Trackage Rights Exemption-Illinois Central Gulf Railroad Company* (served May 17, 1983) (not printed) (App. 33a), petition to reopen denied (served October 13, 1983 (not printed) (App. 42a).[6] But the I.C.C. confirmed that the applicable statutes do not require or permit the imposition of employee protective conditions in financial assistance proceedings under 49 U.S.C. 10905. (App. 44a n.3).

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[6]The standard employee conditions in trackage rights cases are *Norfolk and Western Ry. Co.-Trackage Rights-BN,* 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.,-Lease and Operate,* 360 I.C.C. 653 (1980), and were imposed here. (App. 39a, 41a). See also: *Railway Labor Executives' Ass'n* v. *United States,* 675 F.2d 1248 (D.C. Cir.1982).

3. **Cisco-Green's Switch line segment.** In another administrative proceeding, involving ICG's line between Decatur and White Heath, Illinois, the I.C.C. approved abandonment of the 13.14-mile segment between Cisco and Green's Switch, subject to the usual employee protective conditions. Cisco Grain Company offered to purchase the segment, but could not come to agreement with ICG On the terms. The I.C.C. set the price, but the agency decision was remanded on judicial review invoked by ICG. *Illinois Cent. Gulf R. Co.* v. *I.C.C.*, 717 F.2d 408 (7th Cir. 1983).

On remand, petitioner Patrick W. Simmons (United Transportation Union) sought to intervene so as to have the I.C.C. impose the standard employee protective conditions, but on February 27, 1984 intervention was denied on the ground the I.C.C. lacked authority to impose employee protective conditions, the agency citing its earlier decision in the *Davis-Elco* case. Docket No. AB-43 (Sub-No. 85), *Illinois Central Gulf Railroad Company-Abandonment Between Cisco and Green's Switch* (App. 47a):

> Patrick Simmons, the Illinois Legislative Director for United Transportation Union, filed a petition to intervene for the purpose of seeking imposition of employee protective conditions. Neither 49 U.S.C. Subtitle II nor any of our regulations provide for imposition of employee protective conditions in proceedings under 49 U.S.C. 10905. See, *Illinois Central Gulf R. Co-Abandonment,* 366 I.C.C. 911 (1982), on appeal, *sub nom Patrick W. Simmons* v. *ICC,* No. 83-1474, 7th Cir. Accordingly, the petition to intervene is denied.

The I.C.C. set revised terms for sale, which Cisco Grain Company and ICG did not contest. The agency then authorized transfer of the line segment from ICG to Cisco Grain Company, and on March 16, 1984 dismissed the abandonment application without continuing the employee protection conditions which previously had been imposed. (App. 53a-54a).

Judicial Review Proceedings

1. *Simmons I.* The court of appeals reviewed denial of employee conditions in the *Davis-Elco* "voluntary" sale between ICG and CTRC in *Simmons I,* 760 F.2d 126 (1985). (App. 1a). The court of appeals affirmed the I.C.C.'s view that the I.C.C. is not empowered to impose employee protective conditions where a line authorized for abandonment is transferred to another person through the section 10905 process. First, the panel stated the I.C.C.'s interpretation of a statute which it enforces is titled to great weight, citing *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 104 S. Ct. 2778, 2781-83 (1984). 760 F.2d at 129. (App. 4a) Second, and more importantly, the court stated that employees often would be better off if a line is acquired by another for continued operation, than if the line is abandoned with employee protective conditions (760 F.2d at 131. (App. 7a):

> A better answer to the loophole argument is that employees often (though not always, and maybe not here, given the buyer's small size) are better off if a line is acquired than if it is abandoned, since if it is abandoned the employment of railroad workers will surely be reduced. So there is no great anomaly if the appearance of a white knight (the Cairo Terminal Railroad Company)

> who saves a line from abandonment has the consequence of disentitling employees on the line to protective conditions and forcing them to take their chances on being kept on by the line's new owner. Cf. *Railway Labor Executives' Ass'n* v. *ICC*, 735 F.2d 691, 704 (2d Cir. 1984) (Friendly, J.).

Third, the court of appeals stated that to allow the I.C.C. to impose employee conditions on the selling railroad (here, ICG) may exceed Congress' willingness to force railroads to sell their abandoned lines to other operators. 760 F.2d at 131. (App. 7a-8a):

> The important thing is that the statute provides for a forced sale. To allow the Commission to pile onerous labor-protective conditions on the selling railroad may exceed Congress' willingness to apply compulsion to railroads abandoning unprofitable lines. Not only might he Commission, being eager for the sale to go through, set too low a price for the line; it might (under Simmons' view) further reduce the net benefits of the sale to the railroad by imposing costly labor-protective conditions.,

Finally, the court of appeals in *Simmons I* held that if the I.C.C. is authorized to impose protective conditions, there are no guidelines to determine which conditions should govern, and this is an indication that if the statute is to be supplemented it should be done by Congress or by the I.C.C. 760 F.2d at 131. (App. 8a).[7]

[7]The court of appeals also disposed of certain issues in the trackage rights proceeding – which were unrelated to employee protection. 760 F.2d at 131-32. (App. 8a-10a). Curiously, the opinion admonishes counsel for challenging the I.C.C.'s grant of the construction exemption to CTRC, for we find nothing in the briefs on this score. 760 F.2d at 132. (App. 10a).

2. *Simmons II.* A different panel of the court of appeals determined employee protection aspects of the "forced sale" of the Cisco-Green's Switch abandonment proceeding in *Simmons II,* 766 F.2d 1177 (1985) (App. 13a). The court of appeals stated that there is no distinction between a "voluntary" and "involuntary" sale under 49 U.S.C. 10905, and that the reasoning in *Simmons I* applies to "forced" or "involuntary" sales. 766 F.2d at 1179 (App. 16a-17a):

> In denying the petition, the Commission relied on its decision in Simmons I for the conclusion that it was without authority under section 10905 to impose protective conditioins. As indicated above, that decision was recently upheld by this court. Thus, it is clear that, in the case of a "voluntary" sale under section 10905, the ICC is unable to impose such conditions. (fn. omitted). The issue then in the instant case is whether the reasoning of *Simmons I* applies to a "forced" or "involuntary" sale under the statute. For the reasons stated below, we agree with the Commission that it does. (fn. omitted).

The reasons given by the second panel for agreeing with the first panel differ from those given by the first panel. In essence, *Simmons II* recites the justification advanced by the I.C.C., which is that the subject of employee protection is not mentioned in the legislative consideration of the 1980 amendment to section 10905, whereas the employee protection appears throughout other changes made by Staggers Rail Act of 1980.[8] 766 F.2d at 1180-82. (App. 19a-21a); 366 I.C.C. at 912-13. (App. 28a-31a).

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[8]Simmons II states that Simmons in his reply "acknowledges that labor-protective conditions are not "terms of sale," and thus petitioner concedes that section 10905 does not expressly authorize the I.C.C. to impose such conditions. 766 F.2d at 1181. (App. 20a). We fail to see any such statement in the reply brief in *Simmons II.*

REASONS FOR GRANTING THE PETITION

This case is of exceptional importance because the decisions of the court of appeals, if permitted to stand, will cause serious injury to railway employees and represents an important question of federal law which has not been, but should be, settled by this Court. Rule 17.1(c).

Railway employees have suffered a drastic reduction in their ranks owing to the consolidation and abandonments which have taken place. Employment by the nation's Class I railroads stood at 1,351,961 persons in 1947, which dropped to 322,030 persons in 1983.[9] The national rail transportation policy directs the I.C.C. to encourage fair wages and safe and suitable working conditions in the railroad industry. 49 U.S.C. 10101a(12) (1976 ed., Supp. V).

Protection for railroad employees in abandonments and in acquisitions is a hallmark of national policy in this industry, and is expressed in numerous commands to the I.C.C., particularly 49 U.S.C. 10903(b)(2) respecting abandonments and discontinuance of service, and 49 U.S.C. 11347 respecting railroad acquisitions, consolidations, purchase of line, and trackage rights. This national policy is also evident from the decisions of this Court, e.g., *United States* v. *Lowden,* 308 U.S. 225 (1939); *Railway Labor Executives' Assn.* v. *United States,* 339 U.S. 142 (1950); *I.C.C.* v. *Railway Labor Assn.,* 315 U.S. 373 (1942); *Maintenance Employes* v. *U.S.,* 366 U.S. 169 (1961);*Norfolk & W. Ry. Co.* v. *Nemitz,* 404 U.S. 37 (1971).

The issue before the Court is not what type of employee protection should be granted in section 10905 proceedings,

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[9]Assn. of American Railroads, *Railroad Facts,* 56 (1984 ed.)

or even whether any protection should be granted. This petition for a writ of certiorari is directed to the I.C.C.'s ruling – sustained by the court of appeals – that the I.C.C. has no jurisdiction to impose protective conditions.

The case is thus of key importance to railway employees.

1. When Congress in 1980 amended section 10905 so as to direct a "forced sale" of a line, where a person offers to acquire a line to be abandoned, on terms to be set by the I.C.C, there was absolutely no need for the Congress to legislate special provisions for employee protection. For the financial assistance provisions of section 10905, which require an I.C.C. finding that public convenience and necessity permit abandonemnt under section 10903 before section 10905 may be invoked[10] – had been administered by the I.C.C. without change in the requirement of employee protection. Thus, the employees of the abandoning carrier received protection, and if the purchaser was another carrier, the purchasing carrier's employees also would receive protection if adversely affected by the transaction. In addition, protective obligations might be placed upon a non-carrier under section 10901, if appropriate. *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 129 and 354 I.C.C. 252, 270 (1976); 49 CFR 1121.38(j) (1977 ed. thru 1980 ed.).

2. The legislative history indicates no intention to change the employee protection practices under section 10905 when the "forced sale" provisions were added in 1980. This Court reviewed the legislative history of the "force sale" amendments to section 10905 in *Hayfield Northern R.* v. *Chicago and N.W. Transp.*, ____ U.S.

[10]See: 49 U.S.C. 10905(c), *infra*, App. 56a.

____, 104 S.Ct. 2610, 81 L.Ed 5278 (1984), without any mention of a change in employee protection policy.

3. The decisions below point to certain language in the amended section 10905(e), indicating that if the abandoning carrier and a person enter into a purchase *agreement* for continued rail service, the I.C.C. shall approve the *transaction* and *dismiss* the abandonment application:

> If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application of abandonment or discontinuance.

But the dismissal of an abandonment application does not mean that all previously-imposed conditions are withdrawn and, in any event, conditions can be imposed upon the purchaser, the cost of which may be borne either by the purchaser or seller. The fact that the I.C.C. "shall" approve the transaction does not mean that standard conditions cannot be imposed, and the term *transaction* is not necessarily the same as the term *agreement.*

The I.C.C. has a long-maintained practice, where a person seeks to acquire a line which is the subject of a pending abandonment proceeding, of dismissing the abandonment proceeding and approving the acquisition subject to the standard employee protective conditions, the cost to be borne by the carrier whose abandonment application is being dismissed. Examples of reported decisions include *Prairie Trunk Ry.-Acquisition and Operation,* 348 I.C.C. 832, 852, 854-55 (1977), aff'd *People of State of Ill. v. United States,* 604 F.2d 519 (7th Cir. 1979), cert. den., 445 U.S. 951; *Cadillac & Lake City Ry. Co. Acquisition and Operation,* 320 I.C.C. 617, 618-19 (1961); *Iowa Term. R.*

Co. Acquisition and Operation, 312 I.C.C. 546, 551 (1961); *Durango & S.N.G.R. Co.-Acquisition & Operation,* 363 I.C.C. 292, 294-6 (1979); *Railway Labor Executives Ass'n* v. *Durango & Silverton,* 363 I.C.C. 841 (1981), aff'd sub nom.*Railway Labor Executives' Ass'n* v. *United States,* 697 F.2d 285 (10th Cir. 1983).

Accordingly, the I.C.C. has authority to impose employee conditions when it approves the purchase transaction. Specific language in section 10905(e) is unnecessary.[11] The provisions of the national transportation policy, now the rail transportation policy (49 U.S.C. 10101a) provide a basis to give the I.C.C. jurisdiction. *United States* v. *Lowden,* 308 U.S. 225, 238 (1939). Cf. *I.C.C.* v. *Railway Labor Ass'n,* 315 U.S. 373 (1942).

4. The reasons advanced by the court of appeals in *Simmons I* for holding the I.C.C. is without authority to impose conditions are not substantiated. Reliance upon *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.,* 104 S. Ct. 2278, 2781-83 (1984) in support of the view the reviewing court is to give great weight to an administrative gency's interpretation of the statute it enforces misplaced. The I.C.C.'s disclaimer of jurisdiction is not a *legislative* regulation promulgated by the agency, as in *Chevron.* Instead, it is an *administrative* interpretation, where the reviewing court is not required to give effect to the agency's interpretation. *Batterton* v. *Francis,* 432 U.S. 416, 424-25 n.9 (1977). Here, little deference is due the administrative determination. Courts must reject adminis-

[11] Of course, the "terms of sale" power of the I.C.C. to condition its approval is broad enough for employee conditions in "forced sale" proceedings. The decision in *Simmons II* struggles with this issue, but is not convincing.

trative construction which is inconsistent with the statutory mandate or frustrates Congressional policy. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). Here, the I.C.C.'s interpretation is not due to its specialization in labor-management relations,[12] but simply is one of interpreting legislative history. Davis, *Administrative Law Treatise*, Vol. 2, p. 107, Section 7.22 (2d ed. 1979).

The reasoning of the panel that employees would likely be better off if the line is acquired than if it is abandoned needs no comment, as it is sheer speculation. Similarly, the panel's notion of a Congressional intent not to impose employee conditions in "forced sale" cases is without any record support. Finally, the contention that the reviewing court has no guidelines as to the appropriate protective conditions warrants no extended response. It is the task of the I.C.C. to determine the appropriate conditions, not the task of the court of appeals.

5. The reasons advanced by the court of appeals in *Simmons II* are similarly erroneous. The fact of extensive employee protection in the Staggers Rail Act of 1980, along with other contemporaneous amendments involving employee protection in other railroad laws, indicates that Congress did not intend to withdraw employee protection where it existed in accordance with agency interpretation. The silence of Congress in amending section 10905 must

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[12]The I.C.C. has many times acknowledged its lack of expert competence in railroad management-labor matters. *Leavens* v. *Burlington Northern*, 348 I.C.C. 962, 973-75 (1977). The agency does not have primary jurisdiction in this field. *David E. Morrow* v. *S.C.L.R. Co. & United Transp.*, 363 I.C.C. 861 (1981); *Haskell H. Bell* v. *Western Maryland Railway Company*, 366 I.C.C. 64 (1981).

be construed to mean there was no intended change with respect to employee protection under section 10905.

In the reverse situation, where the policy of the I.C.C. was *not* to impose employee protection in a case involving an "entire line abandonment," the reviewing court found that because Congress in the Staggers Act provided employee protection in certain situations, while remaining silent in other situations, meant that silence indicated an intent not to change the status quo. *Railway Labor Executives' Ass'n* v. *I.C.C.*, 735 F.2d 691, 700-2 (2d Cir. 1984). Here, Congress' failure to include employee protection in revising section 10905, indicates that Congress saw no reason to change the handling of employee protection under section 10905.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. NAUGHTON
30 North LaSalle St.
Room 2100
Chicago, IL 60602

GORDON P. MacDOUGALL
(Counsel of Record)
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 223-9738

Attorneys for Petitioner

September 13, 1985

APPENDIX A

Amended Opinion

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-1474, 83-2820

PATRICK W. SIMMONS

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

ILLINOIS CENTRAL GULF RAILROAD,

Intervening Respondent.

Petition for Review of Orders of the
Interstate Commerce Commission.

ARGUED JANUARY 21, 1985—DECIDED MARCH 15, 1985
AMENDED MAY 2, 1985

Before BAUER and POSNER, *Circuit Judges*, and JAMESON, *Senior District Judge.**

POSNER, *Circuit Judge*. These petitions to review two related orders of the Interstate Commerce Commission require us to consider a question of first impression under the provision of the Interstate Commerce Act governing offers of financial assistance to head off the abandonment of a railroad line, 49 U.S.C. § 10905. The question is whether the Commission is authorized or required to impose labor-protective conditions on either or both of the

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* Hon. William J. Jameson of the District of Montana, sitting by designation.

parties to a section 10905 sale. Patrick Simmons, the Illinois legislative director of a union representing employees of the selling railroad, has asked us on the union's behalf to set aside a Commission order that approved such a sale without such conditions, the Commission's ground being that they were not required or even authorized. *Illinois Central Gulf R.R.—Abandonment—in Alexander County, Il*, 366 I.C.C. 911 (1983). A subordinate dispute over a trackage-rights agreement entered into by the parties to the sale and approved by the Commission in a separate order is discussed at the end of this opinion.

Section 10905 dates from the Railroad Revitalization and Regulatory Reform Act of 1976 (see 90 Stat. 129) but was significantly amended by the Staggers Rail Act of 1980, and in its present form provides as follows. Within 10 days after the Commission announces its decision to allow a railroad to abandon a line, anyone (including another railroad, as the Commission held in this case, 366 I.C.C. at 914 n.3, and the petitioner does not dispute) may offer to buy the line. 49 U.S.C. § 10905(c). If within 15 days after the announcement the Commission finds that the offeror is financially responsible and that the offer satisfies certain minimum conditions, it must suspend its permission to abandon in order to give the parties time to negotiate the purchase. § 10905(d). If as in this case the parties come to terms, "the Commission shall approve the transaction and dismiss the application for abandonment," provided the terms include an agreement to continue providing rail service on the line. § 10905(e). But if the parties are unable to come to terms, and either of them requests the Commission to fix the terms for them, the Commission shall do so, based on the fair market value of the line. §§ 10905(e)-(f). The provision for forced sale was added in 1980. Before then all the Commission could do was delay abandonment for six months to give a prospective purchaser a chance to negotiate with the railroad before the line was abandoned. See *Chicago & N.W. Transport. Co. v. United States*, 678 F.2d 665, 667-68 (7th Cir. 1982).

Nos. 83-1474, 83-2820

In 1982 the Illinois Central Gulf Railroad applied to the Commission for permission to abandon an 18-mile line in rural Illinois. A local railroad owned and operated by three men, the Cairo Terminal Railroad Company, filed an application under section 10905 to acquire all but a half mile of the line. The two railroads arrived at mutually satisfactory terms for the sale, and the Commission approved it. The Commission also approved the abandonment of the remaining half mile, subject to *Oregon Short Line* protective conditions, which the Commission routinely imposes in abandonment cases and which among other things require the abandoning railroad to pay, for six years, the wages of employees terminated as a result of the abandonment. See *Oregon Short Line R. Co.— Abandonment—Goshen*, 360 I.C.C. 91, 93-95, 98-103 (1979). The Commission refused to impose any conditions on the sale of the 17.5 mile stretch to the Cairo Terminal Railroad Company, rejecting Simmons' argument for *New York Dock* conditions. These are the same as *Oregon Short Line* conditions, but are imposed on both parties to railroad mergers and consolidations governed by 49 U.S.C. § 11343. See *New York Dock Ry.— Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84-90, aff'd under the name of *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). The *Oregon Short Line* conditions were designed for abandonments, and in most abandonment cases there is only one party, the abandoning railroad.

Since *Oregon Short Line* conditions are identical to *New York Dock Ry.* conditions so far as length of job protection is concerned, it might seem to make no difference whether or not the Commission was required or allowed to impose the latter conditions, or any conditions, on the sale of the 17.5 mile stretch to the Cairo Terminal Railroad Company. But it might make a difference. The arbitrator (see below) might decide that not all of the workers affected by the sale of the 17.5 mile stretch were also affected by the abandonment of the remaining half mile, in which event some workers would lose out who would have been protected if conditions had been imposed on the entire transaction. And some workers might fare

better if the Cairo Terminal Railroad Company shared the labor-protective obligations of the Illinois Central Gulf Railroad, as it would if *New York Dock* conditions were imposed. Labor protection doesn't just mean guaranteeing dismissed workers six years of full pay. In fact that is just a residual benefit to which they are entitled if they are terminated. They must first be given a chance to get permanent jobs elsewhere on the railroad, and they have a right to arbitrate any dispute with the railroad over the latter's failure to find them permanent jobs. See *Southern Pac. Transport. Co. v. ICC*, 736 F.2d 708, 714 (D.C. Cir. 1984) (per curiam); *Walsh v. United States*, 723 F.2d 570, 573-74 (7th Cir. 1983). Maybe some of the affected workers in this case could force the Cairo Terminal Railroad Company to take them on if that railroad as well as Illinois Central has an obligation to consider their claims to permanent jobs—though, given the minute size of the Cairo Terminal Railroad Company, this seems pretty unlikely.

Since the question whether the Commission was required or allowed to impose labor-protective conditions—specifically the *New York Dock* conditions—is not moot, let us turn to it, noting first the Supreme Court's recent and emphatic directive to give great weight to an administrative agency's interpretation of the statutes it enforces. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2781-83 (1984). The Commission's interpretation of section 10905 is reasonable, and we think correct. The statute says nothing about labor-protective conditions and, what is more important, contains no suggestion that the Commission has discretion to impose conditions of any sort on transactions within the statute's scope, unless the parties fail to come to terms and the Commission has to fix the terms if requested to do so by either party. But the terms that it fixes in such cases are "the price and other terms of sale," § 10905(f)(1)(C)—not conditions protecting labor. And if the offer to purchase the about-to-be-abandoned line is accepted and provides for a continuation of rail service, the Com-

mission "shall approve the transaction," period. § 10905(e). This is quite different from what the Commission is required to do when it approves the abandonment of a line, which is to issue a certificate that shall "contain provisions to protect the interests of employees." 49 U.S.C. § 10903(b)(2). And section 10901 empowers (but does not require) the Commission to impress labor protection on acquisitions of individual lines, while section 11347 makes such protection mandatory for rail mergers and consolidations. The statute that the Supreme Court construed in *ICC v. Railway Labor Executives Ass'n*, 315 U.S. 373 (1942), to allow the Commission to impose labor-protective conditions empowered the Commission to impose "such terms and conditions as in its judgment the public community and necessity may require." *Id.* at 375. There is no similar provision here. Against this background, the silence of section 10905 on the matter of conditions has a certain eloquence, especially when we consider the active participation of the railroad unions in revisions of the Interstate Commerce Act.

Nor is a transaction under section 10905 a transaction under another section as well—either 10901 (acquisition of a line) or 11343 (rail merger or consolidation). The Commission once thought it was, see *Abandonment of Railroad Lines & Discontinuance of Service*, 354 I.C.C. 252, 270 (1976), but changed its mind, and rightly so, after the Staggers Act amended section 10905. See *Abandonment of Railroad Lines & Discontinuance of Service*, 365 I.C.C. 249, 259-60 (1981); 49 C.F.R. § 1152.27(j)(2). For as the section now reads, a transaction under it cannot be an abandonment, because when the Commission approves a section 10905 sale it must dismiss the abandonment proceeding. And it cannot be a line acquisition or a railroad consolidation, as section 10905 requires the Commission to act peremptorily if the conditions in the section are satisfied, regardless of whether the criteria used in evaluating other transactions are satisfied. See 49 U.S.C. §§ 10901(a), 11344(d).

Against this it can be argued that a transaction (a section 10905 purchase) that is in effect a composite of two transactions which if done separately would require

protective conditions ought to require the conditions too, lest railroads be encouraged to do in one step what if done in two (abandonment followed by purchase) would clearly require the conditions. It is not much of an answer that the Commission may not be *required* to impose protective conditions on the two-step transaction because protective conditions are discretionary in line-acquisition cases under section 10901. This section traditionally has not been thought applicable where a line is being acquired by another railroad for continued rail service. See our recent discussion in *In re Chicago, M., St. P. & P. R.R.*, 756 F.2d 508, 514-15 (7th Cir. 1985). There is some authority for applying it where the acquired line is very tiny and for not insisting on labor-protective conditions in such a case even if the line would be abandoned if not acquired, but in the principal case the seller was selling his entire (tiny) railroad business, which is not what happened here. See *Okmulgee N. Ry. Abandonment*, 320 I.C.C. 637 (1964); *In re Valuation Proceedings, Etc.*, 531 F. Supp. 1191, 1265-66 (Spec. R.R.R. Act Ct. 1981) (per curiam). In any event, though it is more than likely that the Commission would not have imposed protective conditions in this case if it had thought it had the power but not the duty to do so, we cannot uphold the Commission's order on that ground; we cannot exercise discretion committed to it. See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *General Elec. Co. v. NRC*, 750 F.2d 1394, 1403-04 (7th Cir. 1984); *Illinois v. ICC*, 722 F.2d 1341, 1348 (7th Cir. 1983). It believed it had no power, and its decision must stand or fall on that belief.

It might seem that if, as Simmons emphatically asserts, labor-protective conditions must be imposed on both parties to a section 10905 transaction, the purposes of the statute will be defeated; potential offerors such as the Cairo Terminal Railway Company will be deterred by the prospect of bearing the heavy costs of those conditions. But this is not a very telling point either, though mentioned with approval by the Commission. The selling railroad can always reduce the sale price, or promise the buying railroad to bear the entire cost of the conditions.

Since the seller would have to bear that cost anyway if it simply abandoned the line, the price reduction or the guarantee is not an added detriment imposed by section 10905 on the seller and therefore will not deter section 10905 transactions.

A better answer to the loophole argument is that employees often (though not always, and maybe not here, given the buyer's small size) are better off if a line is acquired than if it is abandoned, since if it is abandoned the employment of railroad workers will surely be reduced. So there is no great anomaly if the appearance of a white knight (the Cairo Terminal Railroad Company) who saves a line from abandonment has the consequence of disentitling employees on the line to protective conditions and forcing them to take their chances on being kept on by the line's new owner. Cf. *Railway Labor Executives' Ass'n v. ICC*, 735 F.2d 691, 704 (2d Cir. 1984) (Friendly, J.).

The argument for reading into section 10905 a power or duty to impose protective conditions on transactions would have been stronger before section 10905 was amended in 1980 to empower the Commission to fix the terms of sale. If negotiations fall through and either party requests the Commission to fix those terms, the selling railroad is not allowed to reject the Commission's terms, even if it would rather abandon the line after it finds out what the Commission's terms are—even, indeed, if it always considered abandonment preferable to sale. It is true that the Commission did not fix the terms here, that the parties came to terms. But of course they bargained knowing that if Illinois Central held out for more than the Cairo Terminal Railroad Company considered fair market value, Cairo Terminal could ask the Commission to fix the terms of sale and Illinois Central would be bound. The important thing is that the statute provides for a forced sale. To allow the Commission to pile onerous labor-protective conditions on the selling railroad may exceed Congress's willingness to apply compulsion to railroads abandoning unprofitable lines. Not only might

the Commission, being eager for the sale to go through, set too low a price for the line; it might (under Simmons' view) further reduce the net benefits of the sale to the railroad by imposing costly labor-protective conditions.

Finally, if we held that section 10905 authorizes labor protection we would have the embarrassing task of deciding without statutory guidance what protection it should be: *Oregon Short Line*? *New York Dock*? Discretionary protection as under section 10901? Good arguments could be made for all three and we are disinclined to choose among them without a clearer indication that Congress wanted us to do so. If the statute is to be supplemented, it should be done by Congress or by the Commission, not by us. Having due regard for the Commission's considered refusal to do so, we hold that there is no labor protection in a section 10905 sale.

The second issue in the case arises from the Illinois Central's having agreed to give the Cairo Terminal Railroad Company trackage rights over a 4.5 mile stretch of Illinois Central track between the 17.5 mile stretch that Illinois Central was selling to Cairo Terminal and the latter's operations in Cairo. Although such a transaction ordinarily would require the same type of determination that the Commission makes when asked to approve a railroad merger or consolidation, see 49 U.S.C. §§ 11343(a)(6), 11344(a), the Commission exempted the transaction pursuant to section 10505(a), which empowers the Commission to exempt from regulation a "transaction or service . . . of limited scope" as to which regulation "is not necessary to carry out" the policies enumerated in 49 U.S.C. § 10101a (a list of 15 goals of federal railroad policy). Simmons mainly objects to the Commission's having broken off the 4.5 mile trackage-rights agreement from the larger transaction between Illinois Central and Cairo Terminal, a transaction having two parts—the sale of the 17.5 mile stretch, and the grant of trackage rights to connect up that stretch with the rest of Cairo Terminal's system. Simmons argues that if the two parts

together would not have been exempted if viewed as a single transaction, the Commission ought not be allowed to break them apart and exempt one component.

The general point has obvious merit. Every transaction can be decomposed. If the Commission had treated the acquisition of the 17.5 mile stretch as 17.5 acquisitions of 1-mile stretches, and had exempted each one on the basis of limited scope, it would have been acting arbitrarily. But the sale of the 17.5 mile stretch was a separate transaction from the trackage-rights agreement by virtue of section 10905, and one the Commission had no discretion to turn down once the parties came to terms. Although the Commission could have consolidated the trackage-rights agreement and the line transfer procedurally, it could not have merged them substantively, because the statutory criteria of approval are different.

Regarding the merits of exempting the trackage-rights agreement, viewed separately from the section 10905 sale as it must be, we cannot fault the Commission either. "Limited scope" aptly describes a tiny stretch of line to be used by a tiny railroad for light traffic in a rural area; and we cannot see how the exemption here could interfere with any policies in the Interstate Commerce Act. The legislative history of section 10505 (exemption), well summarized in *Illinois Commerce Comm'n v. ICC*, 749 F.2d 875, 883-85 (D.C. Cir. 1984), indicates that Congress wanted the exemption power to be wielded boldly; the exercise in this case was exceedingly modest.

Simmons also raises a procedural issue. After the Commission granted the exemption, Simmons filed a petition to reopen the proceeding. See 49 U.S.C. § 10327(g)(1)(A); 49 C.F.R. § 1115.4. The Commission described the petition as one to revoke an exemption, and from this Simmons argues that the Commission placed too heavy a burden of persuasion on him. This argument is hard to follow. Anyone who files a petition to reopen a decision has the burden of persuading the tribunal that reopening is warranted; and nothing in section 10505(d), which governs the revocation of exemptions, suggests a

higher burden of persuasion. It therefore makes no difference which provision (revocation or reopening) the Commission thought it was proceeding under. As a matter of fact the Commission applied the specific criteria governing reopening. It thus inquired whether Simmons had demonstrated any material error or changed circumstances, and found quite correctly that he had not and that therefore there was no basis for reopening the proceeding.

Finally, Simmons' challenge to the Commission's grant of a construction exemption to the Cairo Terminal Railroad Company for work in integrating the newly acquired line into its existing business is frivolous, and ought not have been made. We remind the petitioner that frivolous arguments merely detract, and distract, from substantial ones.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 15, 1985

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. WILLIAM J. JAMESON, Senior District Judge

PATRICK W. SIMMONS, Petitioner,	)	
	)	Petition for Review of Orders of the Interstate Commerce Commission
No. 83-1474, 2820 vs.	)	
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Respondents,	)	
ILLINOIS CENTRAL GULF RAILROAD, Intervening Respondent.	)	

This cause was heard on the record form the United States District Court for the Southern District of Illinois East St. Louis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 2, 1985

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. WILLIAM J. JAMESON, Senior District Judge

PATRICK W. SIMMONS, Petitioner,	)	
	)	Petition for Review of Orders of the Interstate Commerce Commission.
No. 83-1474, vs. 83-2820	)	
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Respondents,	)	
ILLINOIS CENTRAL GULF RAILROAD, Intervening Respondent.	)	

ORDER

On March 29, 1985, petitioner Patrick W. Simmons filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

However, a consideration of the petition has led the panel to make some changes in its original opinion. Accordingly, an amended opinion is being issued herewith in substitution for the original opinion.

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*Hon. William J. Jameson of the District of Montana, sitting by designation.

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1352

PATRICK W. SIMMONS,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents,

ILLINOIS CENTRAL GULF RAILROAD COMPANY and CISCO COOPERATIVE GRAIN COMPANY,

Intervening Respondents.

Petition for Review of an Order of the Interstate Commerce Commission

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ARGUED FEBRUARY 27, 1985—DECIDED JULY 15, 1985

Before ESCHBACH and FLAUM, *Circuit Judges*, and DOYLE, *Senior District Judge.**

ESCHBACH, *Circuit Judge.* The primary question presented by this petition for review of an order of the Interstate Commerce Commission ("Commission" or "ICC") is whether the Commission is authorized to impose labor-protective conditions in a "forced" or "involuntary" sale under 49 U.S.C. § 10905 ("§ 10905"). For the reasons stated below, we agree with the Commission's conclusion that it was without authority to impose such conditions in

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* The Honorable James E. Doyle, Senior District Judge for the Western District of Wisconsin, sitting by designation.

an "involuntary" § 10905 sale; the petition for review will be denied.

I

The facts of this dispute may be summarized as follows:

In January 1982, the Illinois Central Gulf Railroad Company ("Illinois Central") filed a notice of intent to abandon approximately 13-½ miles of railway line between Cisco and Green's Switch, Illinois. *See* 49 U.S.C. § 10903. A complete application for abandonment was filed by Illinois Central in February 1982. In May 1982, the ICC issued its decision granting Illinois Central's abandonment application.

Under § 10905, however, after the ICC approves an abandonment of a line, any "financially responsible person" who will provide continued rail service over the line may file within 10 days of the ICC's approval an offer to purchase the line. Cisco Cooperative Grain Company ("Cisco") did in fact file such an offer within the time period and was found by the Commission to be "financially responsible." The ICC then postponed the issuance of the certificate of abandonment to allow Illinois Central and Cisco either to negotiate a price or to request that the Commission set the terms of the sale. *See* § 10905(d). The parties were unable to come to an agreement; Cisco then petitioned the Commission to establish the terms. The ICC did in fact determine the values of the properties involved, but on appeal that decision was remanded by this court for reconsideration. *Illinois Central Gulf Railroad Co. v. Interstate Commerce Commission*, 717 F.2d 408 (7th Cir. 1983).

When this action was again before the Commission on remand, petitioner Simmons—the Illinois Legislative Director for the United Transportation Union, which is the collective-bargaining representative for the majority of persons employed by Illinois Central in freight-train

service—filed a petition on November 21, 1983, to intervene for the purpose of seeking the imposition by the ICC of labor-protective conditions in the proposed § 10905 purchase. In an order dated February 13, 1984, the Commission denied the petition to intervene and cited its decision in *Illinois Central Gulf Railroad Co. — Abandonment*, 366 I.C.C. 911 (1983), *aff'd sub nom. Simmons v. Interstate Commerce Commission*, 760 F.2d 126 (7th Cir. 1985) ("*Simmons I*"), in which the agency ruled that it was without authority to impose labor-protective conditions in a § 10905 transaction. The Commission then redetermined the value of the properties and Cisco ultimately accepted these terms. Accordingly, the ICC in an order dated March 12, 1984, approved the transfer of the line to Cisco and dismissed the abandonment application. *See* § 10905(e). No labor-protective conditions were imposed. Simmons now seeks review of the Commission's denial of his petition to intervene.

II

A. Denial of Petition to Intervene

Simmons first argues that the Commission improperly denied his petition to intervene. We initially note that Simmons sought to intervene solely for the purpose of seeking the imposition of labor-protective conditions in the impending § 10905 transaction. As we read its order, the Commission reached the merits of the intervention petition and concluded that the agency was without authority to impose such conditions. Because the ICC found itself unable as a matter of law to provide petitioner with the relief he sought, any further proceedings on the question of labor-protective conditions would have been an exercise in futility; accordingly, the petition to intervene was denied. We add, however, that Simmons's petition was denied on this narrow ground alone. Thus, we do not understand the Commission's denial to extend

any further than the question of the imposition of labor-protective conditions.[1]

In considering the propriety of the Commission's denial of the petition for intervention, we must first determine whether the agency was correct in its conclusion that it was without authority to impose labor-protective conditions in a § 10905 transaction.[2] If the agency was correct, then no further administrative proceedings are necessary.

B. Commission's Authority to Impose Labor-Protective Conditions

In denying the petition, the Commission relied on its decision in *Simmons I* for the conclusion that it was without authority under § 10905 to impose labor-

[1] At oral argument, counsel for petitioner maintained that the circumstances of this dispute had changed because Cisco was not operating the line. However, any questions arising from this alleged failure to provide continued rail service were not considered by the Commission in its order denying petitioner leave to intervene; thus, the issue is not properly presented to this court. As we noted above, the Commission's denial of intervention was limited solely to the question whether the agency had the authority to impose labor-protective conditions in a § 10905 purchase. This ruling does not in any way prejudice the rights that petitioner may have in the event that Cisco does not operate the line.

[2] The parties have devoted considerable attention to questions relating to our standard of review. However, as we noted in *Simmons I*, 760 F.2d at 129, recent pronouncements from the Supreme Court indicate that, without regard to questions of administrative expertise, the judiciary should, as a matter of course, accord great weight to statutory interpretations rendered by the agency responsible for the statute's enforcement if Congress has not directly addressed the precise question at issue and if the agency's interpretation is not unreasonable. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, ____ U.S. ____, 104 S. Ct. 2778, 2781-83 (1984). The reasoning of *Chevron* is controlling in this case, because § 10905 is indeed silent on the question of labor-protective conditions.

protective conditions. As indicated above, that decision was recently upheld by this court. Thus, it is clear that, in the case of a "voluntary" sale under § 10905, the ICC is unable to impose such conditions.[3] The issue then in the instant case is whether the reasoning of *Simmons I* applies to a "forced" or "involuntary" sale under the statute. For the reasons stated below, we agree with the Commission that it does.[4]

The history and procedures of § 10905 have been discussed elsewhere,[5] and will not be reiterated here. For the purposes of the instant dispute, however, it should be noted that in the original version of § 10905, *see* 49 U.S.C. § 1a(6) (1976), the Commission was not empowered to set the terms of compensation in the event that the parties were unable to come to an agreement. The Staggers Rail Act of 1980, P.L. No. 96-448, § 402(c), 94 Stat. 1895, 1942-45 ("Staggers Act"), made two fundamental changes in § 10905. First, in response to "hold out" and other problems created by the original statute, *see Hayfield Northern Railroad Co. v. Chicago & Northwestern Transportation Co.*,

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[3] In this opinion, the term "voluntary sale" refers to a transaction in which the parties agree on the price and other terms of sale without the aid of the Commission. The terms "forced sale" and "involuntary sale" refer to a transaction in which the Commission, pursuant to § 10905(f)(1)(C), determines the price and other terms of sale.

[4] Petitioner argues that the instant dispute may be distinguished from *Simmons I* because Cisco is not a "carrier." We disagree. Section 10905 does not require that the purchaser be a "carrier," but only a "financially responsible person" who will provide continued rail service over the line. *See* § 10905(d), (e); *see also* 1 U.S.C. § 1; 49 U.S.C. § 10102(17). Thus, Cisco's status as a "non-carrier" is not a relevant consideration.

[5] *See, e.g., Hayfield Northern Railroad Co. v. Chicago & Northwestern Transportation Co.*, ____ U.S. ____, 104 S. Ct. 2610, 2615-16 (1984); *Simmons I*, 760 F.2d at 128-29; *Chicago & Northwestern Transportation Co. v. United States*, 678 F.2d 665, 666-68 (7th Cir. 1982).

___ U.S. ___, 104 S. Ct. 2610, 2615-16 (1984), Congress authorized the ICC on request from either party to determine "the price and other terms of sale," § 10905(f)(1)(C), if the parties initially failed to agree on these terms. In no case, however, is the Commission to set a price that is below the fair market value of the line. The terms established by the ICC are binding on the "seller," although the "buyer" may withdraw its offer to purchase within 10 days of the Commission's decision. Second, § 10905(e) now provides that, if the buyer and seller enter into an agreement, the Commission "shall approve the transaction and dismiss the application of abandonment or discontinuance."[6]

The first argument of the Commission, which was upheld in *Simmons I*, is that the mandatory requirements under § 10905(e) of both approval of the transaction and dismissal of the abandonment certificate demonstrate that the labor-protective conditions attached to the agency's approval of the abandonment, *see, e.g.*, § 10903(b)(2), do not come into play when a § 10905 transaction is completed. *See also* 49 C.F.R. § 1152.27(f)(2), (h)(6) (1984); *cf. Abandonment of Railroad Lines & Discontinuance of Service*, 365 I.C.C. 249, 259-61, 272 (1981). However, these requirements—without more—do not determine whether labor-protective conditions may be imposed under § 10905. Nonetheless, they do show that any authority the Commission may have to condition a transaction under other provisions does not "carry through" in a § 10905 transaction. As a result,

[6] A superficial reading of § 10905(e) may suggest that the ICC is only required to dismiss the abandonment certificate in the case of a "voluntary" sale. However, the language of § 10905(e) makes no distinction between "voluntary" and "involuntary" sales, and consideration of § 10905 *in toto* supports the Commission's interpretation that it must dismiss the certificate without regard to the character of the underlying sale. *Compare, e.g.*, § 10905(e) *with* § 10905(f)(2); *cf.* 49 U.S.C. § 10905(b) (Supp. II 1978). We do not understand petitioner to argue to the contrary.

§ 10905 is an independent and discrete procedure, and any authority to impose such conditions must be derived from that provision alone.

After *Simmons I*, it is clear that, in the context of a "voluntary" sale, the Commission cannot impose labor-protective conditions. Thus, the question presented by the instant petition for review is whether the Commission's ability to set the "price and other terms of sale" under § 10905(f)(1)(C) allows it to impose labor-protective conditions in an "involuntary" sale. Certainly the language of § 10905 does not expressly state that the Commission has this authority. As we found in *Simmons I*, 760 F.2d at 129, a common-sense reading of § 10905(f)(1)(C) does not suggest that it refers to labor-protective conditions. Furthermore, as the Commission forcefully asserted in its second argument of *Simmons I*, *see* 366 I.C.C. at 913-14, other provisions of the Staggers Act stand in stark contrast to § 10905(f)(1)(C), because they specifically refer to the protection of employees.[7] The language of these

[7] *See* Staggers Act §§ 213 (codified at 49 U.S.C. § 10505(g)), 219(g) (codified at 49 U.S.C. § 10706 note), 221 (codified at 49 U.S.C. § 10901(e)), 223 (codified at U.S.C. § 11103(c)(1), (2)), 227 (codified at 11 U.S.C. §§ 1170(e), 1172(c)), 401(a) (codified at 49 U.S.C. § 10910(j)); *cf. Interstate Commerce Commission v. Railway Labor Executives Ass'n*, 315 U.S. 373, 62 S. Ct. 717 (1942) (provision empowering Commission to impose "such terms and conditions as in its judgment the public convenience and necessity may require" in abandonment proceedings allowed for imposition of labor-protective conditions); *United States v. Lowden*, 308 U.S. 225, 60 S. Ct. 248 (1939) (statute providing that "[i]f . . . the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation . . . will promote the public interest, it may enter an order approving and authorizing such consolidation . . . upon the terms and conditions and with the modifications so found to be just and reasonable" allowed for imposition of labor-protective conditions in consolidation proceedings).

(Footnote continued on following page)

contemporaneous amendments indicates that Congress simply does not use the phrase "price and other terms of sale" to refer to labor-protective conditions. Petitioner has not referred this court to any contrary indications in the legislative history. Indeed, the committee reports discussing § 10905 are silent on the subject of labor protection. *See* H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 125 (1980); S. Rep. No. 470, 96th Cong., 1st Sess. 40 (1979).

In his reply brief, Simmons acknowledges that labor-protective conditions are not "terms of sale," but rather that they are "imposed by the I.C.C. as a condition to the agency's approval of a transaction." Thus, petitioner in fact acknowledges that these conditions would not ordinarily be imposed when the Commission sets the terms of the transaction under § 10905(f)(1)(C), but only when it subsequently approves the sale and dismisses the initial abandonment certificate. Consideration of the provisions of the Staggers Act that specifically refer to the protection of employees, *see supra* note 7, confirms that such protection is indeed imposed by the Commission as a condition of the final *agency approval* and not as a condition of the underlying sale. Section 10905, however, allows the Commission to determine only the conditions of the underlying sale. Thus, petitioner has in fact conceded that § 10905 does not expressly authorize the Commission to impose labor-protective conditions.

Therefore, in the context of "involuntary," as well as "voluntary," sales, § 10905 is silent on the Commission's authority to impose labor-protective conditions. This lacuna implicates all the concerns we identified in *Simmons I*, 760 F.2d at 129-31, with regard to a judicial

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[7] *continued*

Congressional enactments subsequent to the Staggers Act, *see e.g.*, Rail Safety and Service Improvement Act of 1982, P.L. No. 97-468, tit. II, § 213, 96 Stat. 2543, 2545 (codified at 45 U.S.C. § 915(b)(3)(E)), also indicate that the phrase "price and other terms of sale" does not refer to labor-protective conditions.

construction of § 10905 that would allow for the imposition of such conditions. When the silence of § 10905 is considered in the light of the extensive consideration given to labor protection in the Staggers Act and the provisions of that Act that refer specifically to employee protection, we cannot say that the Commission's interpretation is unreasonable. As we stated in *Simmons I*, 760 F.2d at 131, "[i]f the statute is to be supplemented, it should be done by Congress or by the Commission, not by us." *Cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, ____ U.S. ____, 104 S. Ct. 2778, 2792-93 (1984).

In view of this disposition, we need not consider the Commission's argument, *see* 366 I.C.C. at 913, that Congress "acquiesced" in the agency's post-1980 interpretation of § 10905. However, we will briefly consider a type of congressional "acquiescence" argument advanced by petitioner. As we noted in *Simmons I*, 760 F.2d at 130, the Commission, prior to the Staggers Act, had interpreted § 10905 to allow for the imposition of labor-protective conditions. Petitioner argues that Congress in essence "ratified" these administrative interpretations in 1980 with the passage of the Staggers Act. We disagree.

We initially note that reliance on the chimerical concepts of congressional "silence" or "inaction" as a basis for "acquiescence" or "ratification" is dubious at best. Nonetheless, we do not have to delve into these conundrums, as it is clear that Congress did not simply reenact § 10905 in 1980. To the contrary, the Staggers Act calls for the mandatory dismissal of the abandonment certificate and approval of the transaction when the parties agree to a § 10905 sale. In addition, the Act allowed the Commission in the case of an "involuntary" sale under § 10905 to set only the "price and other terms of sale," while it expressly amended other provisions to provide for labor protection. Thus, no "ratification" of previous administrative interpretations can be inferred from congressional "silence" when the statutory scheme has been so fundamentally altered.

No. 84-1352

III

Because the Commission correctly concluded that it had no authority to impose labor-protective conditions in an "involuntary" sale under § 10905, further administrative proceedings would be of no value. The petition for review is DENIED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 15, 1985

Before
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. JAMES E. DOYLE, Senior District Judge

PATRICK W. SIMMONS, Petitioner,	)	Petition for Review of an Order of the Interstate Commerce Commission
No. 84-1352 vs.	)	
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Respondents,	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY and CISCO COOPERATIVE GRAIN COMPANY, Intervening Respondents.	)	

This cause was heard on the record from the Interstate Commerce Commission, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the petition for review of an order of the Interstate Commerce Commission be, and the same is hereby DENIED, with costs, in accordance with the opinion of this Court filed this date.

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*The Honorable James E. Doyle, Senior District Judge for the Western District of Wisconsin, sitting by designation.

APPENDIX F

Service Date
March 3, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-43 (Sub-No. 92)

ILLINOIS CENTRAL GULF RAILROAD COMPANY – ABANDONMENT – BETWEEN DAVIS AND ELCO, IN ALEXANDER COUNTY, IL

Decided: March 1, 1983

On December 10, 1982, the Administrative Law Judge issued an initial decision authorizing abandonment by Illinois Central Gulf Railroad Company (ICG) of its line of railroad (known as the Davis-Elco line), between milepost 500.0 at Davis and milepost 518.0 at Elco, IL, a distance of 18.0 miles in Alexander County, IL. That decision has been affirmed by the Commission on appeal.

On December 13, 1982, Cairo Terminal Railroad Company (CTRC) filed an offer of financial assistance to acquire that portion of the railroad between milepost 500.00 at Davis and milepost 517.5 at Elco, not including the "Tamms Yard", the "Gravel Pit Spur", and a portion of a passing siding at Tamms, IL. In a decision served December 23, 1982, the Commission determined that the purchase offer was reasonable. It also found that CTRC was a financially responsible party. Accordingly, the issuance of a certificate authorizing the abandonment was postponed subject to CTRC's offer to acquire the 17.5-mile portion. The decision also stated that CTRC could request the Commission to set conditions or amount of compensation if the parties failed to negotiate a voluntary agreement.

By letter of February 14, 1983, CTRC requested the withdrawal of the prior request to set terms, because the parties have negotiated an agreement. Accordingly, ICG's application to abandon the segment between mileposts 500.0 and 517.5 will be dismissed and the transfer to CTRC of that property will be authorized.

This action will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. Pursuant to 49 U.S.C. 10905(f)(2), CTRC is authorized to acquire the line segment of the Illinois Central Gulf Railroad Company between milepost 500.0 at Davis and milepost 517.5 at Elco, not including the "Tamms Yard," the "Gravel Pit Spur", and a portion of a passing siding at Tamms, IL.

2. Pursuant to 49 U.S.C. 10905(f)(2), Illinois Central Gulf Railroad Company's application to abandon the portion of its line between milepost 500.0 at Davis and milepost 517.5 at Elco, IL, is dismissed.

3. This decision is effective upon date of service.

By the Commission, Herber P. Hardy, Director, Office of Proceedings.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX G

Served June 16, 1983

F-9941

INTERSTATE COMMERCE COMMISSION

AB-43 (Sub-No. 92)

ILLINOIS CENTRAL GULF RAILROAD COMPANY – ABANDONMENT – IN ALEXANDER COUNTY, IL

Decided June 2, 1983

The Commission will not impose labor protective conditions in financial assistance proceedings governed by 49 U.S.C. 10905.

Gordon P. MacDougall for petitioner.
John H. Doeringer for applicant.

DECISION

By the Commission:

On December 10, 1982, an Administrative Law Judge issued an initial decision authorizing the Illinois Central Gulf Railroad Company (ICG) to abandon its 18-mile rail line between milepost 500 at Davis and milepost 518 at Elco, IL, subject to the employee protective conditions in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979) (*Oregon Short Line*). The initial decision was affirmed by the entire Commission by decision served March 1, 1983.

During the pendency of the administrative appeal, the Cairo Terminal Railroad Company (CTRC) filed an offer

of financial assistance under 49 U.S.C. 10905 to purchase the 17.5-mile portion of the line between milepost 500 at Davis and milepost 517.5 at Elco. By decision served December 23, 1982, we determined that CTRC was a financially responsible party and that the purchase offer was reasonable. Accordingly, the issuance of a certificate authorizing abandonment of this segment was postponed subject to CTRC's offer.

CTRC subsequently requested the Commission to set terms and conditions. This request was withdrawn on February 14, 1983 after ICG and CTRC negotiated a voluntary sales agreement. By decision served March 3, 1983, the Commission pursuant to 49 U.S.C. 10905(e) dismissed ICG's abandonment application for the 17.5-mile line segment and authorized CTRC to acquire this line.

Because no party filed an offer to purchase the remaining 0.5-mile line segment, the Commission's March 1, 1983 decision affirming the initial decision in the abandonment proceeding included a certificate of abandonment for this short segment. The certificate became effective on March 31, 1983, and was made subject to the *Oregon Short Line* employee protective conditions.

On March 10, 1983, Patrick W. Simmons, Illinois Legislative Director for the United Transportation Union (UTU), filed a petition to reopen this proceeding on the basis of material error. UTU argues that the Commission erred by failing to impose employee protection in the CTRC acquisition. UTU suggests that this transaction should have been subject to the conditions contained in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*). ICG has replied.

While UTU has sought the imposition of the *New York Dock* conditions, our discussion here concerns whether any labor protective conditions are warranted in proceedings under 49 U.S.C. 10905.

We will not impose labor protective conditions in financial assistance proceedings because the applicable statutes neither require nor permit us to do so.

Initially, we note that the statute is silent on the issue of labor protection. Section 10905(e) provides that "* * * If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission *shall approve the transaction and dismiss the application for abandonment and discontinuance* [emphasis added]." Since the statute requires the dismissal of the abandonment application, all conditions qualifying our approval of the abandonment (including labor protection, public use and environmental conditions) must be dismissed as well. In light of the specific directions of the statute, it is inappropriate to find that Congress empowered the Commission to require labor protections under 49 U.S.C. 10905.

Second, if Congress intended a contrary result, the legislative background of this section suggests that Congress would have included an express provision for labor protection in the statute. The forced sale provisions of section 10905 were enacted in the Staggers Rail Act of 1980. In this act, Congress gave labor issues intense scrutiny and enacted several express provisions which either required the Commission to impose labor protection or gave the Commission the discretion to impose labor protection. For example: (1) section 213 revises the Commission's exemption authority under 49 U.S.C. 10505 to provide that the Commission cannot exercise exemption authority to

relieve a carrier of its obligation to protect employee interests under Subtitle IV of Title 49; (2) section 219(g) provides that the Commission shall require rail carrier members of rate bureaus to provide labor protection to rate bureau employes; (3) section 221 directs the Commission to exercise its discretion in imposing employee protection in proceedings under 49 U.S.C. 10901; (4) section 223 gives the Commission the power to exercise its discretion in imposing labor protection when reciprocal switching is directed under 49 U.S.C. 11103(c)(2); (5) section 227 requires the bankruptcy court to extend labor protection to employees of bankrupt rail carriers when the court authorizes certain transactions; and (6) section 401 requires the Commission to direct a selling carrier under the Feeder Railroad Development Program (49 U.S.C. 10910) to provide protection to its employees and direct the purchasing carrier to use the employees who normally work on the line to the maximum extent possible.[1] Because of these numerous express provisions for labor protection, it must be presumed that by omitting any similar provisions in 49 U.S.C. 10905 Congress did not intend this power to exist.

Moreover, the Commission has issued many decisions under 49 U.S.C. 10905 beginning with *Chicago and North Western Transportation Co.—Abandonment,* 363 I.C.C. 956 (1981) (*Lake Geneva Line*). These decisions did not include any protection for employees. Since the issuance of *Lake Geneva Line,* Congress has had over 2 years to take corrective action and yet has not acted. This is so, notwith-

[1]It is particularly significant that the Feeder Line Development Program (49 U.S.C. 10910) includes labor protection provisions since this program (like the financial assistance proceedings) deals with the forced sale of rail line.

standing that Congress has recently enacted two major pieces of legislation that made significant changes in the procedures and governing law to be applied by the Commission. See the Rail Safety and Service Improvement Act of 1982, Public Law 97-468 and the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35.[2]

While UTU acknowledges that 49 U.S.C. 10905 contains no provisions for labor protection, it argues that rail carriers should not be relieved of their obligation to protect employes in line acquisitions which otherwise would be subject to our jurisdiction under 49 U.S.C 10901 and 49 U.S.C. 11343-11347. UTU notes that the imposition of labor protection is mandatory under 49 U.S.C. 11343 and discretionary under 49 U.S.C. 10901.

Acquistions under 49 U.S.C. 10901 and 49 U.S.C. 11343 *et seq.* are not analogous to acquisitions under 49 U.S.C 10905. Congress provided that these three types of transactions are not governed by the same criteria and are not to be treated in a similar manner. For example, under 49 U.S.C 10905, the Commission is required to authorize an acquisition once the carrier and the offeror enter into a purchase agreement. On the other hand, under 49 U.S.C. 11343, an acquisition may be authorized only if the tran-

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[2]This inaction is also relevant in light of certain changes made by these acts. For example, section 213 of the Rail Safety and Service Improvement Act sets forth procedures under which a financially responsible person may purchase rail lines of a carrier subject to liquidation (as defined in that section). Like the financial assistance proceedings under 49 U.S.C. 10905, this new section provides for the forced sale of lines. Unlike section 10905, however, this section provides specific provisions for the protection of employees, *e.g.*, the acquiring carrier must use the employees or former employees of the carrier subject to liquidation in the operation of the line (45 U.S.C. 915(b)(3)(E)).

saction meets the criteria of 49 U.S.C. 11344. Similarly, a transaction under 49 U.S.C. 10901 may be authorized only if the present or future public convenience and necessity require or permit the transaction. Further, under both sections 10901(c) and 11344(c) the Commission may under certain circumstances impose conditions on the transaction. This power is not granted to the Commission in the case of a voluntary negotiated sale under 49 U.S.C. 10905.[3] Accordingly, the provisions of these two statutes are distinguishable from that here under consideration.

Finally, we note that UTU has argued that the appropriate conditions to be imposed in transfers pursuant to 49 U.S.C. 10905 are the *New York Dock* conditions. While our decision here applies to all labor protective conditions, there is a particular reason to refuse to impose the *New York Dock* conditions. Because these conditions impose labor protection obligations on both the acquiring and the selling carrier, their imposition would conflict with the goals of section 10905. When this statute was enacted, Congress stated that one of its goals was to assist shippers who are sincerely interested in improving rail service. H. Rept. 94-1430, 96th Cong., 2d sess. at 125 (1980). The *New York Dock* conditions are inconsistent with these goals since they will render acquisition more costly and,

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[3]UTU also hints that rail carriers are excluded from acquiring lines under 49 U.S.C. 10905 because they are not "persons" as required by the financial assistance provisions. Rail carriers, however, fall within the broad definition of "person" used in the statutes. See 1 U.S.C. 1 and 49 U.S.C. 10102(12).

therefore, deter efforts which otherwise are to be encouraged.[4]

This action does not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU's petition to reopen is denied.

2. This decision is effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterret, Commissioners Andre and Gradison. Vice Chairman Sterett did not participate.

Agatha L. Mergenovich,
Secretary.

(SEAL)

[4]Compare *Simmons* v. *I.C.C.*, 697 F.2d 326 (D.C. Cir. 1982) where the court determined that the Commission properly did not impose labor protection when operators under modified certificates abandoned rail lines. This decision was based, in part, upon the fact that the protections would hinder a State's ability to preserve local rail service and would be contrary to the congressional policy aimed at facilitating the development of these programs.

APPENDIX H

Service Date
May 17, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30138

CAIRO TERMINAL RAILROAD COMPANY-
TRACKAGE RIGHTS EXEMPTION-ILLINOIS
CENTRAL GULF RAILROAD COMPANY

Decided: May 5,1983

By petition filed March 2, 1983, Cairo Terminal Railroad Company (CTR) seeks an exemption for its acquisition of trackage rights from the prior approval requirements of 49 U.S.C. 11343 *et seq.* The trackage rights agreement involves a 4.5-mile segment of Illinois Central Gulf Railroad Company (ICG) line between Cairo and Davis, IL. Patrick W. Simmons, Illinois Legislative Director for the United Transportation Union (UTU), filed a protest. The Railway Labor Executives' Association (RLEA) also filed comments. Cairo and ICG have replied.

CTR operates a 2.5-mile line in the city of Cairo, IL. It has entered into an agreement to acquire a 17.5-mile ICG line between Davis and Elco, IL, pursuant to financial assistance proceedings under 49 U.S.C. 10905 in Docket No. AB-43 (Sub-No. 92), *Illinois Central Gulf Railroad — Abandonment — Between Davis and Elco in Alexander Country, IL* (Davis-Elco proceeding). Petitioner proposes to connect the two lines by operating over ICG's Cairo-Davis track for a distance of about 4.5 miles. It has submitted a copy of the executed trackage rights agreement with ICG which will allow CTR to perform overhead operations and will save interchange costs that would be involved in short ICG bridge carrier operations on traffic

moving between CTR's separate lines. The arrangement will allow ICG and CTR to designate one interchange point in the Cairo-Davis vicinity instead of two. The agreement also calls for the construction and operation of a connecting track. No exemption for the construction was sought in the petition. The construction will be done by ICG.

UTU argues (1) that the trackage rights request is directly related to the *Davis-Elco* proceeding and should not be considered separately; (2) that the proposal contemplates track construction which requires an application under 49 U.S.C. 10901; (3) that this transaction does not meet the standards imposed in 49 U.S.C. 10505; and (4) that any authority granted in this decision requires the imposition of the employee protective conditions contained in *New York Dock Ry. - Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). UTU also requests that any decision clearly state that the Commission has no jurisdiction over provisions of the trackage rights agreement describing which railroad's employees shall operate the line.

PRELIMINARY MATTERS

Bifurcation of Proceedings. —UTU argues that the *Davis-Elco* abandonment and financial assistance proceedings are related to this trackage rights exemption. UTU argues that these proceedings should have been considered simultaneously.

The trackage rights exemption request could have been considered during the financial assistance state of the *Davis-Elco* proceeding. *See* Docket No. AB-167 (Sub-No. 56N), *Conrail Abandonment of the Cairo Branch Line in Illinois* (not printed), served March 4, 1982. However,

there is nothing in the statute or regulations which *requires* the simultaneous consideration of these proceedings. Accordingly the separate consideration of these matters is not improper.

UTU has also inferred that ICG and CTR have attempted to perpetrate a fraud on the Commission by attempting to transform a sale of line under 49 U.S.C. 11343 *et seq.*, into an abandonment and sale under 49 U.S.C. 10903-10905. UTU suggests that we not "reward" such action by granting an exemption here.

Nothing in the record indicates that ICG and CTR have engaged in any questionable conduct. They merely exercised their right to agree to a voluntarily negotiated sale of property under 49 U.S.C. 10905, and then trackage rights to connect CTR's two lines of railroad.

Track construction. – UTU argues that the trackage rights agreement requires the construction of a connecting track "between ICG and [CTR]". UTU is not aware of any filing of an application for approval of construction.

ICG and CTR argue that the connection is not an extension of a line or an additional line within the meaning of section 10901. CTR and ICG state that the construction will merely require the installation of a switch between two existing ICG tracks in its Davis yard complex. They contend that under section 10907(b) this Commission has no authority over the construction of spur, industrial, a team, switching, or side tracks located entirely in one State.

It is unclear whether the connection is beyond the Commission's jurisdiction. In *New Orleans Terminal Company* v. *Spencer,* 366 F.2d 160, 165-166 (5th Cir. 1966), the court said:

> If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a 'line of railroad, or extension thereof,' and there can be no abandonment of such trackage without obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission. If, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is 'spur, industrial,' team, switching or side tracks' and as such, not under Commission jurisdiction.

See also Detroit & M. Ry. Co. v. *Boyne City, G. & A.R. Co.*, 286 Fed. 540, 547 (1923), and *Duluth, S.S. & A.R. Co.* v. *Chicago, M. St. P. & P.R. Co.*, 307 I.C.C. 311, 315 (1959). While the parties claim that the construction will be a switching track, it appears that CTR may also use the track as an integral part of actual movements between its two lines as well. Accordingly, our construction authority may be required.

The Commission may begin an exemption proceeding on its own initiative. 49 U.S.C. 10505(b). Under the circumstances, and in order to avoid any delay in CTR's operation, we conclude that it is appropriate, on our own motion, to do so and treat the construction as if it were included in the petition for exemption.[1]

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[1]We are acting here so that CTR's operation will not be stalled because of a question of regulatory authority. If the construction falls within the exemption of 49 U.S.C. 10907, our action is a nullity. However, if we have jurisdiction over the construction, exemption will expedite rail service. While the record contains sufficient factors to decide the exemption, they are not present to decide the type of track.

STATUTORY REQUIREMENTS

Under 49 U.S.C. 10901 and 11343, railroad construction and trackage rights agreements require prior approval and authorization of the Commission. Pursuant to 49 U.S.C. 10505, the Commission shall exempt transactions when it finds that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction is of limited scope or (b) regulation is not necessary to protect shippers from the abuse of market power.

DISCUSSION AND CONCLUSIONS

Protestant contends that the trackage rights proposal does not meet exemption standards. UTU claims the proposal will not foster sound economic conditions in transportation or encourage efficient management [49 U.S.C. 10101a(5) and (10)] because: (1) CTR's contention that trackage rights would eliminate an inefficient dual interchange is unsupported, and (2) the rights would result in inefficient operations because two railroads would be operating over a segment of track where one railroad now handles all of the business. UTU also contends that the agreement is inconsistent with section 10101a(12) because it will not encourage fair wages and safe and suitable working conditions. In support of its contention, UTU points out that CTR is nonunion and alleges that CTR's wage scale is substandard.

We conclude that our detailed scrutiny of this trackage rights transaction and the related track construction in a formal proceeding is not necessary to carry out the goals of the rail transportation policy. Exemption would clearly minimize the need for Federal regulatory control and re-

duce regulatory barriers to entry. While UTU has questioned the efficiencies which may result from exemption, the record demonstrates that exemption will promote efficient rail transportation and ensure the continuation of a sound rail system. For exemple, exemption would eliminate the need for CTR to maintain two wholly separate operations and allow CTR to make more efficient use of its two locomotives. Because the exemption would eliminate one point of interchange, ICG and CTR would be able to reduce car accounting and inspection costs and increase the efficiency of its interchange operations. Although UTU claims that fair wages in the rail industry will not be encouraged, there is no indication the three owner-employees of CTR (all are members in good standing of their rail unions) will set unfair wages given the economic constraints of the business.

The proposals are of limited scope. The track over which Cairo will operate is only 4.5 miles long and the track to be constructed will be a short connection of two ICG lines. Moreover, service over the line will be limited to overhead traffic. Protestant's argument that the transaction is not of limited scope is based entirely on its contention that the agreement and the *Davis-Elco* proceeding are really a sale. As noted above, that position is not well taken.

Since we have concluded that the transactions are of limited scope, we need not consider whether regulation is necessary to protect shippers from the abuse of market power. We conclude that the exemption should be granted.

LABOR PROTECTION

Under 49 U.S.C. 10505(g)(2), we cannot relieve the carrier of its obligation to protect employees. The employee protective conditions set forth in *Norfolk and Western Ry. Co. - Trackage Rights - BN,* 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc. - Lease and Operate,* 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n* v. *United States,* 675 F.2d 1248 (D.C. Cir. 1982), satisfy the statutory requirements for protection of employees involved in a trackage rights transaction. These conditions will be imposed here. Labor protection conditions in track construction proceedings under 49 U.S.C. 10901 are discretionary with the Commission. No need has been shown for their imposition here.[2]

UTU notes that section 4.1 of the agreement describes which carrier's employees shall operate CTR's trains over the ICG line and requests that we disclaim jurisdiction over that matter because it comes under the Railway Labor Act. Crew assignment provisions in trackage rights agreements are within this Commission's subject matter jurisdiction to the extent they relate to transportation effects of the proposed transaction. *See* Finance Docket No. 28046, *Illinois Central Gulf Railroad Company - Trackage Rights - Over the Chicago & Illinois Midland Railway Company Between Springfield and Andrew, Illinois* (not printed), served February 22, 1977. However, we need not reach the issue raised by UTU since our action is based on

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[2]While UTU has requested that the *New York Dock* conditions be imposed, that request is based upon the previously considered argument that the *Davis-Elco* proceeding and this trackage rights agreement should not be considered separately. We rejected that contention above. Moreover, we note that the proper level of labor protection in the *Davis-Elco* proceeding is now the subject of a petition for review filed by UTU.

our exemption authority in 49 U.S.C. 10505, and not our consolidation authority, requiring approval of contracts, in 49 U.S.C. 11344.

ENVIRONMENTAL CONSIDERATIONS

The Commission has previously determined that environmental impacts associated with trackage rights are insignificant. *See* 49 C.F.R. 1105.6(c)(7). Accordingly, our initial review indicates that exemption of the trackage rights proposal will not significantly affect energy consumption or the quality of the human environment. Our initial review of the construction proposal also indicates that exemption will not significantly affect energy consumption or the quality of the human environment. However, because the proposal may include the construction of a short track segment, the Commission has notified appropriate State agencies in Illinois of the opportunity to submit information concerning the energy and environmental impact of the proposed action.

EXPEDITIOUS ACTION

Petitioner has requested that the Commission's decision be handled expeditiously to allow it to eliminate the inefficiency which would be caused by dual interchange at the earliest possible date. Therefore, the exemption granted here will be effective on publication of notice in the *Federal Register.*

It is ordered:

1. Pursuant to 49 U.S.C. 10505, we exempt the acquisition by Cairo Terminal Railroad Company of trackage rights over the rail line of the Illinois Central Gulf Railroad Company for approximately 4.5 miles between mile-

post 500 and Cairo, IL, via Davis, IL, from the requirements of 49 U.S.C. 11343, subject to the employee protective conditions in *Norfolk and Western Ry. Co. -Trackage Rights - BN,* 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc., - Lease and Operate,* 360 I.C.C. 653 (1980). Pursuant to the same authority, we also exempt the related track connection construction from the prior approval requirements of 49 U.S.C. 10901.

2. Notice of our action shall be published in the *Federal Register.*

3. These exemptions will continue in effect for one year from the effective date of this decision. Consummation must occur during that time in order to use these exemptions The parties shall notify the Commission of consummation of the transactions promptly after consummation has occurred.

4. This decision shall be effective on May 18, 1983.

5. Petitions to reopen must be filed by June 7, 1983.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

Agatha L. Mergenovich
Secretary

(SEAL)

APPENDIX I

Service Date
Oct. 13, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30138

CAIRO TERMINAL RAILROAD COMPANY-
TRACKAGE RIGHTS EXEMPTION-ILLINOIS
CENTRAL GULF RAILROAD COMPANY

Decided: October 6, 1983

By petition filed June 7, 1983, Patrick W. Simmons, Illinois Legislative Director for United Transportation Unon (UTU), seeks reopening of this proceeding and reconsideration of the decision served May 17, 1983. In that decision we exempted the acquisition by Cairo Terminal Railroad Company (CTR) of trackage rights over a segment of line of the Illinois Central Gulf Railroad Company (ICG) from the requirements of 49 U.S.C. 11343, subject to the employee protective conditions in *Norfolk and Western Ry. Co. - Trackage Rights-BN,* 354 I.C.C. 605, as modified by *Mendocino Coast Ry., Inc.-Lease and Operate,* 360 I.C.C. 653 (*N&W*). We also exempted from the requirements of 49 U.S.C. 10901 the construction of a connecting track related to the trackage rights transaction. The trackage rights extend over approximately 4.5 miles of ICG line between milepost 500 and Cairo, IL, via Davis, IL. Replies to the petition to reopen were filed by ICG and CTR.

UTU seeks to have the exemption denied. In cases where an exemption has been granted the appropriate remedy is revocation of the exemption. 49 U.S.C. 10505(d). The party seeking to have an exemption revoked has the burden of showing that application of a provision of 49 U.S.C. Sub-

title IV is necessary to carry out the transportation policy of 49 U.S.C. 10101a. Our following discussion of the issues raised by UTU shows that no ground for revocation of the exemption has been given. Therefore, the petition will be denied.

UTU alleges material error in that the Commission treated the trackage rights proposal as a transaction separate from the sale by ICG of a 17.5 mile line between Davis and Elco, IL, to CTR. It argues that the trackage rights are an integral part of the financial assistance transaction and that they should have been handled together pursuant to 49 U.S.C. 11343, in which case the appropriate employee protective conditions to be imposed would be those contained in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (*New York Dock*).

The acquisition of the 17.5 mile line by CTR had been authorized pursuant to an offer of financial assistance filed under 49 U.S.C. 10905 in Docket No. AB-43 (Sub-No. 92), *Illinois Central Gulf Railroad-Abandonment-Between Davis and Elco, in Alexander County, IL* (Davis-Elco). Abandonment of the line had been approved March 1, 1983, in the *Davis-Elco* proceeding. An agreement was reached pursuant to the financial assistance procedures, and ICG's application to abandon the 17.5 mile line segment was dismissed by decision served March 3, 1983, *aff'd Illinois Central Gulf R. Co. - Abandoment*, 366 I.C.C. 911 (1983).[2] The trackage rights agreement between CTR and ICG will enable CTR to link a 2.5 mile line over

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[1]ICG had been authorized to abandon an 18 mile line of railroad.

[2]*Pet. for review pending sub nom. Patrick W. Simmons* v. *Interstate Commission & United States of America*, 7th Cir. No. 83-1474 (filed March 18, 1983).

which it presently conducts operations with the 17.5 mile line sold to it by ICG.

As we stated in our May 17, 1983 decision, there is nothing in the statute or regulations which requires the simultaneous consideration of a trackage rights exemption under section 10505 and an offer of financial assistance under section 10905. The option of how to proceed with a transaction before the Commission lies with the applicants. *Knox & Kane R. Co.-Petition for Exemption,* 366 I.C.C. 439, 443 (1982) and *Central R. Co. of New Jersey-Abandonment,* 342 I.C.C. 227, 282-83 (1972). The approach used by CTR and ICG was appropriate. Further, the result would be unchanged even if the issues were considered in a single proceeding. Consolidation of separate section 10505 and section 10905 proceedings does not affect our application of the statutory criteria[3]

The *N&W* employee protective conditions satisfy the statutory requirements for the protection of employees affected by a trackage rights transaction and have been consistently imposed in such proceedings. There is nothing in the record in this proceeding to warrant a deviation from this practice or to justify the imposition of labor protective conditions other than the *N&W* conditions.

UTU also objects to granting the track construction exemption under 49 U.S.C. 10505 alleging that there are insufficient facts upon which to base the exemption and that the transaction is not limited in scope. As was noted on page 5 of our May 17, 1983 decision, there are sufficient

[3] We previously considered the issue of employee protection in the financial assistance proceeding, *Illinois Central Gulf R. Co.-Abandonment, supra.* In that decision we concluded that the applicable statutes neither require nor permit us to impose labor protective conditions in financial assistance proceedings under 49 U.S.C. 10905.

facts on the record to grant the exemption. The record lacked sufficient information to decide whether the track to be constructed was switching track subject to the statutory exemption of 49 U.S.C. 10907 and thus beyond the scope of the Commission's jurisdiction. To avoid delay by requesting additional information, we approved the track construction exemption, which made it unnecessary to determine whether section 10907 was applicable to this situation and delay the start of efficient operations. The track to be constructed involves a short connection of two ICG lines, the trackage rights proposal to which it is related covers a total distance of 4.5 miles, and the service over the trackage will be limited to overhead traffic. These figures amply support the conclusion that the transaction is of limited scope. Moreover, regulation is not necessary to carry out the goals of the rail transportation policy since it would minimize the need for Federal regulatory control, promote efficient rail transportation and ensure the continuation of a sound rail system.

The petition to reopen will be denied.

This action will not affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition of UTU to reopen is denied.

2. This decision is effective on the date served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

Agatha L. Mergenovich
Secretary

(SEAL)

APPENDIX J

Service Date
Feb. 27, 1984

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-43 (Sub-No. 85F)

ILLINOIS CENTRAL GULF RAILROAD COMPANY-ABANDONMENT BETWEEN CISCO AND GREEN'S SWITCH

IN THE MATTER OF A REQUEST TO SET CONDITIONS AND COMPENSATION

Decided: February 13, 1984

This proceeding is before us on remand from the United States Court of Appeals for the Seventh Circuit, for further consideration.[1]

On May 21, 1982, Cisco Cooperative Grain Company (Cisco Grain) filed a timely offer of financial assistance to acquire an Illinois Central Gulf Railroad Company (ICG) line between milepost 14.22 at Cisco, IL, and milepost 27.63 at Greeen's Switch, IL, a distance of 13.41 miles.

In a decision served August 24, 1982, we set the purchase price for the line at $279,122.40. We accepted ICG's net salvage value estimate, with minor modifications, and the offeror's land value. ICG appealed our determination of land value.[2]

On appeal the court held that we had not adequately supported our findings on land value. Accordingly, we reopened this proceeding by decision served October 17,

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[1] *Illinois Central Gulf Railroad Co.* v. *ICC,* 717 F.2d 408 (7th Cir., 1983).

[2] ICG did not challenge our determination of net salvage value at $106,202.

1983, for further analysis of the land value. Upon request of ICG, we expanded the scope of the reopened proceeding to include new evidence on track and track materials, by decision served December 28, 1983. Both parties submitted new evidence.

Preliminary Matter. A. Patrick Simmons, the Illinois Legislative Director for United Transportation Union, filed a petition to intervene for the purpose of seeking imposition of employee protective conditions. Neither 49 U.S.C. Subtitle II nor any of our regulations provide for imposition of employee protective conditions in proceedings under 49 U.S.C. 10905. *See, Illinois Central Gulf R. Co. - Abandonment,* 366 I.C.C. 911 (1982), on appeal, *sub nom Patrick W. Simmons* v. *ICC,* No. 83-1474, 7th Cir. Accordingly, the petition to intervene is denied.

Land Value. ICG sets a value for the land of $541,286.[3] Cisco Grain's estimate is $182,350.

ICG's land valuation is based on comparable sales of rural and town land during 1983. ICG characterizes 113.89 acres of the right-of-way as rural because the highest and best use is for farming. ICG assigns a value of $1,800 per acre for the rural land, based on a $2,200 per acre comparable sales value subject to a downard adjustment of $400 to reflect the condition of the land.

ICG describes the remaining 35.54 acres as town land land, where the highest and best use is residential, commercial, and industrial development. ICG values town land at $0.15 per square foot, $0.25 per square foot, and

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[3]ICG submitted two estimates of land value, one of $541,286 prepared by an "in-house" appraiser, and another of $495,000 prepared by an independent appraiser. For this analysis, we are using the "in-house" estimate because of its greater detail.

$0.35 per square foot, depending upon locating and proximity to other development.

Cisco Grain asserts that 141.43 acres should be characterized as rural based on its opinion of the property's highest and best use. Cisco Grain's estimate is based on a comparable sales value for rural farmland of $2,400 per acre, reduced by (1) $600 per acre restoration cost, (2) 25 percent for decreased productivity resulting from the prior use of the land and the existence of Illinois Power Company (IPC) electric transmission towers and easement, and (3) a present worth factor of .8678, based on a 1½ year sell-off period and a 10 percent carrying cost. Cisco Grain contends that 7.97 acres could be used for residential, commercial, or industrial development and should be valued at $2,400 per acre based on comparable sales.

Cisco Grain's evidence is to establish that the highest and best use for all of the property is for undeveloped uses or farmland. Cisco Grain has shown that IPC holds a perpetual easement along the entire right-of-way to build and maintain its electric transmission lines making any use of the property other than as farmland unlikely.

Valuation of this right-of-way must take IPC's easement into account. This easement grants IPC the right to construct, or install, or repair any facilities on the property subject to the easement without the consent of the underlying property's owner, in the event ICG sells the right-of-way to a non-railroad purchaser. The easement is a major impediment to any development of the land, especially construction, and inhibits farming to some degree.

We question this land's value because of the easement. The only evidence in the record was presented by Cisco

Grain, which asserted that the existence of the easement and associated farming problems reduced the value of the land by 25 percent. ICG offered no evidence of the easement's effect on land value.

Accordingly, since it appears that the highest and best use of all the right-of-way is for undeveloped uses or farming, we will reduce the value of all 149.43 acres characterized by Cisco Grain as rural land to reflect a loss in value due to the IPC easement. We will not apply this reduction to the remaining 7.97 acres described as town property since it was not raised by any party.

The base value of $2,400 per acre assigned by Cisco Grain to the rural property is slightly higher than the base value of $2,200 used by ICG. This figure is not only more favorable to ICG, but it is based on comparable sales from within Macon County, as opposed to the comparable sales from another Illinois county used by ICG. Accordingly, we will accept Cisco Grain's estimate.

We will also accept Cisco Grain's estimate of $2,400 per acre for town land as it is supported by comparable sales and reflects the limited development potential of the property. ICG's estimates for urban property were substantially higher, were supported by descriptions of adjacent developed property, but did not account for the IPC easement. Accordingly, since Cisco Grain has supported its estimates and ICG has not adequately supported its estimates of urban property, we will accept Cisco's estimate instead of ICG's.

We agree also with Cisco Grain's estimate of a 1 and ½-year sell-off period applicale to all of the property.[4] We

[4]ICG's comparable right-of-way sales in Livingston County, IL, revealed only about one-third of the property sold one year after abandonment.

will not apply the $600 per acre restoration cost sought by Cisco Grain. ICG's evidence included contracts for ballast removal clearly showing that sale of ballast from the right-of-way approximately offsets any other costs for restoration.

Cisco Grain has sustained its burden of proof, and with the modifications described above, we find that the land value is $237,518.[5]

Track and Track Materials. ICG's updated evidence on the net salvage value of track and track materials is $156,412. Cisco Grain's estimate is $130,804.

Cisco Grain accepts all of ICG's salvage estimates with the exception of the second-hand value of angle bars, tie plates, and turnouts. On the basis of a price quotation from a local track materials dealer, Cisco Grain estimates a second-hand value for angle bars and tie plates of $9,468 per track mile.[6] Cisco thus estimated the second-hand value of such bars and plates at $12,673 (rather than ICG's assigned value of $35,578) for 1.34 miles of track, a $22,905 reduction from ICG's $274,906 gross salvage value calculation. In addition, Cisco Grain received a quote of $4,200 for a second-hand turnout of 112-pound rail and $4,000 for a second-hand turnout of 90-pound rail. The track has one 112-pound turnout and three 90-pound turnouts, resulting in a total value of $16,200, rather than ICG's $18,903 estimate. This further reduction of $2,703 reduces ICG's gross salvage value to $249,298.

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[5]Based on (a) $2,400 per acres x 141.43 acres x 0.75 (25 percent reduction in value) x 0.8678 (present worth factor) and (b) $2,400 per acre x 7.97 acres x 0.8678 (present worth factor).

[6]Calculated on the basis of: (1) $13 per pair of angle bars x 266 pairs of angle bars per mile = $3,468; and (2) $1 per tie plate x 6,000 tie plates per mile = $6,000.

We will accept the modified values proposed by Cisco Grain. ICG's valuation of $26,550.83 per track mile of angle bars and tie plates and $19,089 for turnouts is unsupported. Cisco Grain, on the other hand, has based its estimate on recent price quotes from dealers located within the area. Cisco Grain has carried its burden or proof with regard to the value of angle bars, tie plates, and turnouts.

The net sale value of track and track materials is set at 130,804.

Purchase Price Summary. On remand, we have determined the purchase price of the line as follows:

Land Value	$23,518	
Gross Salvage Value		$249,298
Less Removal Costs		$118,494
Net Salvage Value	$130,804	
Net Liquidation Value	$368,322	

Terms of Closing. The parties do not address the terms of closing. However, to ensure the smooth transfer of the involved line we shall establish the following terms: (1) payment will be made by cash or certified check; (2) closing will occur within 90 days of the service date of this decision; (3) ICG shall convey all property by quit claim deed; and (4) ICG shall deliver all releases from any mortgages within 90 days of closing. The parties may alter any of the closing terms pursuant to mutual agreement.

Pursuant to our power to set conditions in purchase agreements, we will require the offeror to notify both ICG and the Commission of its decision to accept the terms of this decision or withdraw its offer. Written notification must be submitted to ICG and the Commission within 10 days of the service date of this decision.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The purchase price for the line segment between milepost 14.22 at Cisco, IL, and milepost 27.36 at Green's Switch, IL, is fixed at $368,322.00. Other terms of sale must comply with the provisions discussed above. Cisco Grain may withdraw its offer to purchase the segment within 10 days of the service date of this decision. The prospective purchaser must notify the Commission, ICG and all other parties must notify the Commission, ICG and all other parties of record in writing, on or before the tenth day after service of this decision, whether it intends to purchase the line-segment at the price set in this decision.

2. If Cisco Grain fails to file a timely statement of intent, we will consider its offer withdrawn. If, on the other hand, it indicates its intent to consummate, Cisco Grain and ICG will be bound by the terms and conditions established in this decision.

3. If Cisco Grain withdraws it offer for the segment, the Commission shall immediately issue a certificate and decision authorizing abandonment of the line-segment.

4. This decision shall be effective on the service date.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison.

James H. Bayne
Acting Secretary

(SEAL)

APPENDIX K

Service Date
Mar. 16, 1984

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-43 (Sub-No. 85)

ILLINOIS CENTRAL GULF RAILROAD COMPANY-ABANDONMENT BETWEEN CISCO AND GREEN'S SWITCH

Decided: March 12, 1984

By decision served May 26, 1982, I found that Cisco Cooperative Grain Company (Cisco) had made a *bona fide* offer of financial assistance to acquire an Illinois Central Gulf Railroad Company (ICG) line segment between milepost 14.22 at Cisco, IL, and milepost 27.63 at Green's Switch, IL, a distance of 13.41 miles, which ICG sought to abandon in this proceeding. I also found that Cisco was a financially responsible party. Issuance of an abandonment certificate was postponed to allowed Cisco and ICG an opportunity to negotiate a voluntary purchase agreement. The decision also provided that Cisco could request the Commission to set the conditions and amount of compensation for its purchase of the line segment. On June 25, 1982, Cisco requested that the Commission set conditions and compensation for its purchase of the line.

By decision served February 27, 1984,[1] the Commission set the purchase price for the line segment. On March 8, 1984, Cisco timely notified the Commission, ICG, and all other parties of record that it intends to purchase the line

[1]This decision was on remand from the United States Cour t of Appeals for the Seventh Circuit, which held that the Commission, in a prior decision served August 24, 1982, had not adequately supported its findings on land valuation.

segment at the purchase price set in the decision of February 27, 1984.

Under these circumstances, the Commission is required to approve the transaction and dismiss the abandonment application. 49 U.S.C. 10905(e). Accordingly, the abandonment application will be dismissed and the transfer to Cisco of the line segment will be authorized.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Pursuant to 49 U.S.C. 10905(e), Cisco is authorized to acquire ICG's line segment between milepost 14.22 at Cisco, IL, and milepost 27.63 at Green's Switch, IL.

2. Pursuant to 49 U.S.C. 10905(e), ICG's application to abandon the described 13.41-mile line segment is dismissed.

3. This decision is effective on the date of service.

By the Commission, Herber P. Hardy, Director, Office of Proceedings.

James H. Bayne
Acting Secretary

(SEAL)

APPENDIX L

§ 10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation

(a) A Rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) Abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(b)(1) Subject to sections 10904—10906 of this title, if the Commission—

(A) finds public convenience and necessity, it shall—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions that the Commission finds are required by public convenience and necessity; or

(B) fails to find public convenience and necessity, it shall deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of

employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

§ 10905. Offers of financial assistance to avoid abandonment and discontinuance

(c) When the Commission finds under section 10903 of this title that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer shall be filed concurrently with the Commission. If the offer to subsidize or purchase the line is less than the carrier's estimate provided under subsection (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued and

(2) it is likely that the assistance would be equal to—

(A) The difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsection (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall aprove the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based

on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding no both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(2)

Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-438

In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK W. SIMMONS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals properly affirmed the Interstate Commerce Commission's interpretation that 49 U.S.C. 10905 does not permit the imposition of labor protection as a condition for the sale of rail lines that would otherwise be abandoned.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The petition for a writ of certiorari embraces two cases that involve identical or closely related questions. The opinion of the court of appeals in the first case (*Simmons I*) (Pet. App. 1a-10a) is reported at 760 F.2d 126, and the opinion in the second case (*Simmons II*) (Pet. App. 13a-22a) is reported at 766 F.2d 1177. The Interstate Commerce Commission's underlying decision in *Simmons I* (Pet. App. 26a-32a) is reported at 366 I.C.C. 911; its decision in *Simmons II* (Pet. App. 46a-52a) is unreported.

JURISDICTION

The judgments of the court of appeals in *Simmons I* and *Simmons II* (Pet. App. 11a, 23a) were entered on March 15, 1985, and July 15, 1985, respectively. A petition for rehearing in *Simmons I* was denied on May 2, 1985 and the court's

opinion was amended on that date. On July 11, 1985, Justice Stevens extended the time for filing a petition for a writ of certiorari in *Simmons I* to and including August 30, 1985, and on August 21, 1985, further extended the time to September 14, 1985. The petition for a writ of certiorari was filed on September 13, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATEMENT

1. This case involves the provisions of the Staggers Rail Act amendments to the Interstate Commerce Act regulating the process by which rail carriers may abandon unprofitable lines. Under 49 U.S.C. 10903, a carrier may abandon a rail line (or discontinue rail operations on a line) only if it obtains permission from the Interstate Commerce Commission (ICC) and only if it provides certain protections to its employees. 49 U.S.C. 10903(b)(2). That procedure does not apply, however, when a financially responsible person comes forward within ten days and offers to purchase the line to provide continued rail service. In that event, 49 U.S.C. 10905(d) requires the ICC to postpone abandonment authorization. The prospective purchaser then has 30 days in which to negotiate a sale agreement with the current owner. If they fail to reach an agreement within that time, either party may request the Commission to set the terms of the sale. 49 U.S.C. 10905(e). The Commission must then do so within 60 days (49 U.S.C. 10905(f)), establishing a purchase price that is not below the "fair market value of the line." 49 U.S.C. 10905(f)(1)(C). Unless the purchaser elects to withdraw his offer within ten days, the Commission's decision is binding on both parties. 49 U.S.C. 10905(f)(2). And, once a binding agreement exists (whether voluntary or imposed by the ICC), the line cannot be abandoned and the abandonment proceeding must be dismissed. 49 U.S.C. 10905(e). See *Hayfield N. R.R.* v. *Chicago & N. W. Transp. Co.*, No. 82-1579 (June 12, 1984). See also *Chicago & N. W.*

Transp. Co. v. *United States*, 678 F.2d 665, 666 (7th Cir. 1982); *Illinois Central Gulf R.R.* v. *ICC*, 717 F.2d 408, 409-411 (7th Cir. 1983); *Black* v. *ICC*, 737 F.2d 643 (7th Cir. 1984).

2. The present proceedings involve the ICC's dismissal of two abandonment proceedings following the purchase of the lines under Section 10905.[1] In both cases the Commission had found the lines to be an economic burden and had initially approved the abandonment, subject to the standard labor protective conditions required by Section 10903(b)(2).[2] But the lines were not abandoned; instead they were sold for continued rail service pursuant to Section 10905. (The terms of the sale were agreed upon voluntarily in *Simmons I*, and were set by the Commission in *Simmons II*.) Petitioner asked that the Commission's dismissals of the abandonment proceedings and authorizations of the sales under Section 10905 be conditioned upon protection of the affected employees.[3] In both cases the Commission declined

---

[1]In *Simmons I*, the Commission had dismissed, for the most part, No. AB-43 (Sub-No. 92) (ICC Mar. 1, 1983), when it approved a proposal by Cairo Terminal Railroad Company (CTRC) to acquire all but one-half mile of an 18 mile line owned by the Illinois Central Gulf Railroad (ICG) (Pet. App. 24a-25a).

In *Simmons II*, the Commission had dismissed No. AB-43 (Sub-No. 85) (ICC Mar. 12, 1984), when it ordered ICG to sell the line involved there to Cisco Cooperative Grain Company (Cisco), a noncarrier (Pet. App. 53a-54a).

[2]These are the labor protective conditions established in *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91 (1979) (the *Oregon III* conditions). They require, inter alia, that the abandoning carrier give 90 days' advance notice to its employees of the intended transaction; negotiate an implementing agreement before consummating the transaction; and provide displaced employees with other positions and/or up to six years of salary protection.

[3]In *Simmons I*, the ICG employees affected by the removal of the line from ICG's system were protected by the *Oregon III* conditions, since a half mile of the line was not purchased by CTRC but was abandoned by

on the ground that it lacks the authority to do so under Section 10905 (Pet. App. 26a-32a, 47a).

In concluding that Congress did not intend to give it such authority, the Commission noted (Pet. App. 28a-30a) that: (1) Section 10905(e) expressly requires the dismissal of the underlying abandonment application when a purchase is made under Section 10905, and thus no conditions qualifying Commission approval of the abandonment (including labor protection) can survive; (2) Congress did not provide for any labor protection in Section 10905 transactions even though in the Staggers Rail Act of 1980 (which had amended that section) Congress gave labor issues intense scrutiny and enacted several provisions that either required labor protection or gave the Commission discretion to impose such protection in other contexts; and (3) although the Commission has issued many decisions under Section 10905, all without labor protection, Congress has not taken any action to change this practice.[4]

ICG pursuant to Section 10903. Petitioner had requested the Commission to impose the *New York Dock* conditions on the sale of the line. These conditions were established in *New York Dock Ry. — Control — Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979), and are virtually identical to the *Oregon III* conditions, except that the *New York Dock* conditions are imposed on each of the carriers involved in a merger or consolidation proceeding. Thus, petitioner wanted CTRC, as well as ICG, to bear labor protection obligations.

In *Simmons II*, petitioner had requested that, in establishing the terms of purchase, the Commission (1) "continue" the *Oregon III* conditions imposed upon ICG in the abandonment decision, and (2) provide that any carrier contracting with Cisco for operation of the line be subject to the *New York Dock* conditions.

[4]The first of these decisions reviewed by a court was *Chicago & N.W. Transp. Co.—Abandonment*, 363 I.C.C. 956 (1981), aff'd, 678 F.2d 665 (7th Cir. 1982). More recent decisions include: *Seaboard System R.R.—Abandonment—In Chatham County, NC*, No. AB-55 (Sub-No. 74) (ICC served Feb. 10, 1984); and *Grand Trunk Western R.R.—Abandonment—In Montcalm & Gratiot Counties, MI*, No. AB-31 (Sub-No. 8) (ICC served May 18, 1984).

3. In *Simmons I* (Pet. App. 1a-10a) the court of appeals affirmed the agency interpretation of Section 10905 as neither requiring nor permitting labor protective conditions to be imposed as a condition of sale. The court first noted (*id.* at 4a) this Court's "recent and emphatic directive" in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), to give great weight to an agency's interpretation of the statutes it enforces. The court then concluded (Pet. App. 4a) that the agency's interpretation was both reasonable and correct.

The court largely adopted the rationale articulated by the Commission (see Pet. App. 4a-5a). The court noted that Section 10905 gives the Commission the power to fix only "the price and other terms of sale" (but not conditions specifically protecting labor) and that in all other respects the Commission has no discretion and "shall approve the transaction." In contrast, the statutes governing other kinds of transactions expressly provide for either mandatory or discretionary labor protection. See, *e.g.*, 49 U.S.C. 10901(e), 10903(b)(2), 11103(c)(2) and 11347. The court observed (Pet. App. 5a) that "[a]gainst this background, the silence of section 10905 on the matter of conditions has a certain eloquence, especially when we consider the active participation of the railroad unions in revisions of the Interstate Commerce Act."

The court rejected petitioner's suggestion that labor protective provisions found elsewhere in the statute be engrafted onto Section 10905. It explained (Pet. App. 5a):

> a transaction under [Section 10905] cannot be an abandonment, because when the Commission approves a section 10905 sale it must dismiss the abandonment proceeding. And it cannot be a line acquisition or a railroad consolidation, as section 10905 requires the

> Commission to act peremptorily if the conditions in the section are satisfied, regardless of whether the criteria used in evaluating other transactions are satisfied. See 49 U.S.C. §§ 10901(a), 11344(d).

The Court found the ICC's interpretation to be reasonable and consistent with Congress's objectives and pointed out the practical difficulties that would arise if the statute were interpreted in any other way (Pet. App. 8a):

> if we held that section 10905 authorizes labor protection we would have the embarrassing task of deciding without statutory guidance what protection it should be: *Oregon Short Line*? *New York Dock*? Discretionary protection as under section 10901? Good arguments could be made for all three and we are disinclined to choose among them without a clearer indication that Congress wanted us to do so. If the statute is to be supplemented, it should be done by Congress or by the Commission, not by us. Having due regard for the Commission's considered refusal to do so, we hold that there is no labor protection in a section 10905 sale.

4. In *Simmons II*, a different panel of the same court also reaffirmed the ICC's construction of the statute (Pet. App. 13a-22a), finding no basis for distinguishing between a "voluntary" and "forced" sale in this regard (*id.* at 19a-21a).[5] It concluded that the statutory phrase "price and other terms of sale" does not embrace labor protective conditions and that the ICC lacks authority to impose

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[5]The court also rejected petitioner's attempt to distinguish *Simmons II* from *Simmons I* because Cisco was not a "carrier." It noted that Section 10905 requires only that the purchaser be a "financially responsible person" who will provide continued rail service on the line (Pet. App. 17a n.4).

conditions on a sale under Section 10905 beyond the "price and other terms of sale" (Pet. App. 20a). Finally, the court rejected petitioner's argument that Congress had ratified or "acquiesced" in the agency's pre-Staggers Act interpretation of former Section 10905 to allow imposition of labor protective conditions. The court emphasized that the Staggers Act fundamentally altered Section 10905 by providing for forced sales, mandatory dismissal of the abandonment proceeding, and mandatory approval of voluntary transactions (Pet. App. 21a). The court echoed the view of the panel in *Simmons I* that (*ibid.*), " '[i]f the statute is to be supplemented, it should be done by Congress or by the Commission, not by us.' "

ARGUMENT

The judgments below are correct and do not conflict with the decisions of this Court or of any other court of appeals. Further review is not warranted.

1. It is a familiar and well settled principle that "the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 6. Accordingly, "[t]o sustain [the agency's decision], we need not find that [the ICC's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946); see *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371-372 (1973). "We need only conclude that it is *a* reasonable interpretation of the relevant provisions." *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 423 (1983) (emphasis in original).

Petitioner suggests nothing that would justify overturning the agency's interpretation, which is clearly reasonable and consistent with the express terms of Section 10905 and with the overall statutory scheme. Nor does the language of Section 10905 offer any support for petitioner's argument that the Commission has authority to impose labor protection. Quite the contrary, the explicit language of Section 10905 compels the court of appeals' conclusion: the statute requires that all conditions qualifying the agency's approval of the abandonment under Section 10903 (which includes labor protection) must be dissolved with the dismissal of the abandonment application. Moreover, the Commission lacks a separate general power to impose such conditions under Section 10905. Compare Section 10903(b)(1)(A)(ii). It may only "determine the price and other terms of sale." 49 U.S.C. 10905(f)(1)(C). A condition requiring ICC-imposed labor protection is clearly not a necessary or typical "term of sale" related to the means of effecting the transfer of the line under Section 10905. See, *e.g.*, Pet. App. 51a.

As the court of appeals recognized, given the potentially large costs associated with labor protections, imposing such a condition could significantly affect the amount of compensation that is paid by the buyer or received by the seller. Since Section 10905(f)(1)(C) requires that "[i]n no case shall the Commission set a price which is below the fair market value of the line," the additional burden of labor protection would have anomalous results. If the selling carrier were required to pay labor protection costs, as petitioner urges here, the net amount it realized in the transaction would be reduced correspondingly. On the other hand, if the labor protection burden were placed on the buyer, it could substantially increase the buyer's costs of the transaction and discourage many purchases of lines for continued rail service. Moreover, it would be contrary to other longstanding

policies, such as not imposing labor protection conditions on newly formed acquiring carriers, such as Cisco.[6]

2. Petitioner can draw no support from those cases (cited at Pet. 13-14) in which (prior to the enactment of current Section 10905) the Commission, acting under Section 10901, authorized the acquisition of rail lines slated for abandonment and (at times) imposed labor protective conditions. Unlike the provision at issue here, Section 10901(e) expressly authorizes the agency, in its discretion, to impose such conditions. Specific reference to labor protection elsewhere shows that Congress knows how to provide for such protection when it chooses. The omission of such language from Section 10905 is therefore a strong indication that Congress did not intend to give the Commission authority to impose labor protection in Section 10905 proceedings.[7]

Petitioner offers no more than policy arguments for a different result. These arguments are more appropriately addressed to Congress than to the courts.

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[6]This policy has been consistently recognized and approved by the courts. See, *e.g., In re Chicago, M., St. P. & Pac. R.R.*, 658 F.2d 1149, 1171 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982) (the burdens on new operators are great enough without the additional costs of labor protection); *Durango & S.N.G.R.R.—Acquisition & Operations*, 363 I.C.C. 292, 295 (1979), aff'd *sub nom. Railway Labor Executives' Ass'n* v. *United States*, 697 F.2d 285, 286 (10th Cir. 1983); *Simmons* v. *ICC*, 697 F.2d 326, 336-337 (D.C. Cir. 1982). See also *Cadillac & Lake City Ry.—Acquisition & Operation*, 320 I.C.C. 617 (1964).

[7]Petitioner relies (Pet. 15-16) on *Railway Labor Executives' Ass'n* v. *ICC*, 735 F.2d 691, 700-702 (2d Cir. 1984) to support its contention that the Commission misconstrued Congress's silence in the wake of other statutes specifically providing for labor protection. That case is inapposite because, as the court noted there, congressional conference committee reports specifically stated that legislative revisions to Section 10903 should not be read as requiring the Commission to depart from its policy of not imposing labor protection on whole line abandonments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission

DECEMBER 1985

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(3)

No. 85-438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK W. SIMMONS,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, et al.,

Respondents.

BRIEF OF RESPONDENT ILLINOIS CENTRAL GULF RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN H. DOERINGER *
RICHARD M. KAMOWSKI
233 North Michigan Avenue
Chicago, Illinois 60601
(312) 565-1600

Attorneys for Respondent
Illinois Central Gulf Railroad Company

December, 1985

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

Whether the Interstate Commerce Commission is authorized to impose employee protective conditions when it approves a purchase offer of a rail line pursuant to 49 U.S.C. § 10905 and dismisses the corresponding abandonment application.

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In The

Supreme Court of the United States

October Term, 1985

PATRICK W. SIMMONS,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, et al.,

Respondents.

BRIEF OF RESPONDENT ILLINOIS CENTRAL GULF RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Illinois Central Gulf Railroad Company ("ICG") submits this Brief in Opposition to the Petition for a writ of certiorari filed by Petitioner, Patrick W. Simmons. An amicus brief in support of the Petition is expected to be filed by Railway Labor Executives' Association (RLEA).

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit are reproduced in Appendices A and D of the Petition, and are reported at 760 F.2d 126 (1985)

and 766 F.2d 1177 (1985), respectively. The decisions of the Interstate Commerce Commission are reproduced in Appendices F through K of the Petition.

STATUTE INVOLVED

The statute involved is 49 U.S.C. § 10905, a part of the Interstate Commerce Act as amended by the Staggers Rail Act of 1980. It is reproduced in part in Appendix L of the Petition, and is reproduced in full in Appendix A to this Brief.

ARGUMENT

Section 10905 of the Interstate Commerce Act, as amended five years ago by the Staggers Rail Act of 1980, does not contain any provisions for employee protection in a purchase offer for a line subject to an abandonment application. Indeed, the statute requires the dismissal of an abandonment application when the Commission approves a sale transaction under Section 10905. Both the Interstate Commerce Commission and the United States Court of Appeals, in two cases, have found no basis or statutory jurisdiction for the Commission to impose protective conditions on either the selling carrier or the purchaser in such a transaction.

The statute on its face does not require any protective conditions. The public and the railroads should be able to rely on Section 10905 as Congress enacted it five years ago, not engrafted with conditions which the rail labor unions wish imposed here (Petitioner Simmons is the Illinois legislative director of a large rail union). Petitioner makes a strained argument attempting to "read in" labor protection into Section 10905 from other sections of the act and from Section 10905 as it existed prior to the enactment of the Staggers Act.

A brief legislative history of the present Section 10905 is reported in U.S. Code Congressional And Administrative News, 96th Congress Second Session (1980), p. 4157 under Section 402—Abandonment. This is reproduced as Appendix B of this Brief. The sole purposes of the new Section 10905 are to provide continued rail service to shippers, and to spare carriers from protracted legal proceedings in the abandonment process. The history also shows that Congress totally repealed the prior Section 10905, which Petitioner here claims to be carried over into the new Section 10905 enacted with the Staggers Act of 1980.

CONCLUSION

This Court should deny the Petition for writ of certiorari, since there is no serious issue of statutory interpretation. Both the Interstate Commerce Commission and the Court below have interpreted the statute enacted in

1980 as it is plainly written and as the legislative history bears out.

Respectfully submitted,

JOHN H. DOERINGER *
RICHARD M. KAMOWSKI
233 North Michigan Avenue
Chicago, Illinois 60601
(312) 565-1600

Attorneys for Respondent
Illinois Central Gulf Railroad Company

* Counsel of Record

December, 1985

APPENDIX A

49 U.S.C. § 10905

§ 10905. Offers of financial assistance to avoid abandonment and discontinuance

(a) In this section—

(1) "avoidable costs" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(2) "reasonable return" means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Interstate Commerce Commission; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Commission.

(b) Any rail carrier which has filed an application for a certificate of abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Commission—

(1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;

(3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and

(4) any other information that the Commission may deem necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) When the Commission finds under section 10903 of this title that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer shall be filed concurrently with the Commission. If the offer to subsidize or purchase the line is less than the carrier's estimate provided under subsection (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over

that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) That decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may

accept the Commission's decision within 20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall, at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1405; Pub.L. 96-448, Title IV, § 402(c), Oct. 14, 1980, 94 Stat. 1942.

APPENDIX B

U.S. Code Congressional And Administrative News, 96th Congress Second Session (1980), p. 4157

SECTION 402—ABANDONMENT

Senate bill.—Section 202 of the Senate bill alters the existing provisions of the Interstate Commerce Act relating to abandonment of railroad lines. This section expedites abandonment proceedings by specifically setting forth time periods within which the Commission must act upon abandonment applications, depending on the complexity of and the opposition to the abandonment proceeding. For example, under existing law, there is no time limit within which an investigation of an abandonment application must be concluded. Section 202(c)(3) places a time limit of 135 days upon such investigations.

Section 202 repeals existing 49 U.S.C. 10905. New section 10905 creates a mechanism that requires railroads to sell a railroad line approved for abandonment to a financially responsible party if the financially responsible party has offered to pay the acquisition cost of the line or the difference between the revenues attributable to providing that service plus a reasonable return on the value of the line. Section 202 also requires rail carriers petitioning for abandonment of a railroad line to provide interested parties an estimate of the subsidy or the minimum purchase price required to keep the line in operation, calculated in accordance with the new provisions in 49 U.S.C. 10905.

The provisions in section 202 assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process.

House amendment.—No provision.

Conference substitute.—The Conference substitute adopts the Senate provision.

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IN THE

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v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

On Petition for A Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION

JOHN O'B. CLARKE, JR.

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Railway Labor Executives' Association as *Amicus Curiae*

Date: December 18, 1985

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Section 10903(b)(2), 49 U.S.C. § 10903(b)(2).	*passim*
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No. 85-438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK W. SIMMONS,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for A Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION

On September 13, 1985, petitioner Patrick W. Simmons, the Legislative Director of the United Transportation Union for the State of Illinois, filed a petition with this Court for the issuance of a writ of certiorari to review two separate decisions by the United States Court of Appeals for the Seventh Circuit upholding the refusal of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] to provide a fair arrangement to protect the interests of employees affected by sales of rail lines pursuant to 49 U.S.C. § 10905. The Railway Labor Executives' Association [hereinafter, "RLEA"] has obtained the written consent of the above-listed respondents to file

a brief with this Court as an *amicus curiae.*[1] This brief, therefore, is respectfully submitted by RLEA as an *amicus curiae* in support of the petition for a writ of certiorari to review the decisions by the court of appeals in *Simmons v. ICC* [hereinafter, "*Simmons I*"], 760 F.2d 126 (7th Cir. 1985), and in *Simmons v. ICC* [hereinafter, "*Simmons II*"], 766 F.2d 1177 (7th Cir. 1985).

INTEREST OF AMICUS CURIAE

Amicus RLEA is a voluntary, unincorporated association of the Chief Executive Officers of nineteen standard labor organizations which collectively represent virtually all organized railroad employees in this Country.[2] RLEA has been the policy spokesperson for its member organizations before Congress, the Courts and the ICC for more than seventy-five years and has stated rail labor's position on matters which affect rail employees generally, including, as is relevant to this case, the manner in which the ICC considers and protects the interests of employees who may be affected by financial transactions approved by the Commission.

Rail labor, and in particular, RLEA, has been actively involved for years in appearing before Congress, before the federal courts and before the ICC to insure that railroad employees are treated fairly whenever the ICC approves a transaction that affects their interests. *See, Hearings on S. 1946, Before Senate Committee on Commerce, Science and Transportation,* 96th Cong., 1st Sess. at 536 (1979); *United States v. Lowden,* 308 U.S. 225 (1939). Those appearances, together with Congress' awareness that rail employees are an essential part of our national transportation system, have resulted in a regulatory scheme which sets forth as one of its goals the need "to encourage fair wages and safe and suitable working conditions in the railroad industry" (49 U.S.C. § 10101a(12)), and which requires the ICC to consider the impact which a merger or other major transaction may have on the interests of rail

[1] RLEA has filed with the Clerk of this Court the written consents from all parties to its filing this brief as an Amicus Curiae.

[2] RLEA's member organizations are listed on Appendix A to this brief.

employees. *E.g.*, 49 U.S.C. § 11344(b)(1)(D). Moreover, that statutory scheme expressly requires the Commission, in specific instances, to provide a fair arrangement to lessen the impact of certain transactions on employees (*e.g.*, 49 U.S.C. §§ 10903(b)(2), and 11347), and it has been held to permit the imposition of such protections even where not expressly required. *E.g., ICC v. RLEA*, 315 U.S. 373 (1942).

The degree of rail labor's involvement in devising the current regulatory scheme for the rail industry has been extensive and Congress' willingness to solicit that involvement has been simply a recognition of the continued validity of what this Court stated more than forty years ago:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

United States v. Lowden, supra, 308 U.S. at 234. As this Court added (*Id.* at 235-36):

> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

Congress and the courts were not the only ones to recognize the vital role which rail employees played in maintaining an efficient rail transportation system for, until recently. the ICC had also appreciated the significance of an efficient labor force.

Even though it required some prodding by this Court, the ICC developed and followed until 1982 the policy of both considering the interests of rail employees and protecting those interests in cases involving regulatory approvals which would have an impact on employees, even where the Interstate Commerce Act did not expressly require such protection. *E.g., Durango & Silverton Narrow Gauge R.R.—Acquisition,* 363 I.C.C. 292 (1979); *Chicago, Burlington & Quincy R.R.—Abandonment,* 257 I.C.C. 700 (1944).

In 1976, Congress modified to a degree the Commission's discretion in this area by amending the abandonment provisions of the Act to mandate that the Commission impose a fair arrangement to protect affected rail employees whenever it issued any abandonment or discontinuance of operations authorization. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 802, § 90 Stat. 31, adding 49 U.S.C. § 10903(b)(2) (as recodified). Consequently, since 1976, the ICC must impose a fair arrangement to protect employees whenever it authorizes an abandonment of rail lines or a discontinuance of rail operations. 49 U.S.C. § 10903(b)(2).[3]

In the two *Simmons* cases which petitioner seeks to place before this Court for review, the Seventh Circuit upheld the ICC's conclusion that even though employee protection was mandatory whenever a railroad abandoned a portion of its lines, such protection was neither required nor permitted when the railroad sold that line under Section 10905 for continued rail operations. Appendix to Petitioner's Brief at 28a. That conclusion raises grave concerns for rail labor because: (1) it leaves employees affected by such a sale without protection or even a guarantee of a job with the new operator, contrary to other provisions of the Interstate Commerce Act; (2) it encourages railroads to use the abandonment-Section 10905 sale route

[3] The ICC and the courts have concluded that there is a limited exception to Section 10903(b)(2) where the abandonment involves the entire line of a small railroad which is not affiliated with another railroad. *RLEA v. ICC,* 735 F.2d 691 (2d Cir. 1984.)

to avoid employee protection obligations,[4] and, in effect, it uses the possibility of escaping labor protection costs as an incentive for selling, rather than abandoning, a line which does not contribute an adequate rate of return to the selling carrier; and (3) it distorts the intent of Congress to support a result which anyone even remotely familiar with this subject knows was never contemplated by Congress or by those who supported this legislation—*e.g.*, the ICC and rail labor. In short, RLEA submits that this case presents an issue which is extremely important to rail labor, not only because it deprives a whole class of employees of benefits to which they are entitled under Section 10903(b)(2) of the Interstate Commerce Act, 49 U.S.C. § 10903(b)(2), but also because it construes the Interstate Commerce Act in a way that reverses more than forty (40) years of viewing employee protection as being remedial and necessary to the orderly administration of the Interstate Commerce Act.

The question of whether Section 10905 prohibits the imposition of employee protection is becoming more important each year as more and more carriers use its provisions to sell rail lines. In fiscal year 1982, when the ICC had not stated that it would not impose employee protection in Section 10905 sales, the ICC's annual report to Congress did not indicate that any applications were filed under Section 10905, even though the ICC had authorized railroads to abandon over 3,100 miles of track during that year. However, during that same fiscal year, the Commission received a dozen inquiries to acquire abandonable lines under the feeder-line program which was established in 1980 by Section 10910 of the Interstate Commerce Act, but

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[4] Indeed, RLEA submits this has already occurred, for in the ICC order being reviewed in *RLEA v. ICC*, 2d Cir. No. 85-4093, the ICC allowed a subsidiary of the CSX railroad system, the Staten Island Railroad Corporation, to sell its lines to a newly formed subsidiary of a short line railroad operator without requiring the railroads to provide any protection for the affected employees. This sale was allowed under § 10905 even though the railroads appear to have made an agreement in principal to use § 10905 before the line was designated as being subject to abandonment. 49 U.S.C. § 10904(e). *See*, Joint Appendix in 2d Cir. No. 85-4093 at 58, 61.

which specifically required the use and protection of the selling carrier's employees. 49 U.S.C. § 10910(e) and (j). *See,* 1982 Fiscal Year Annual, Report of ICC at 38-39. In fiscal 1983, when the ICC announced its policy against employee protection, no feeder-line inquiries were filed, but "[t]he number of persons making offers of financial assistance continued to grow during the fiscal year" with "seventeen offers (16 to purchase lines and one to subsidize continued operations) involving 411 miles" being made. 1983 Fiscal Year Annual Report of ICC at 40-41. This trend has continued into fiscal year 1984 (*see,* 1984 Fiscal Year Annual Report of ICC at 40), and appears to be increasing in late 1985. *See,* ICC Docket No. AB-8 (Sub-No. 8), *Denver & Rio Grande Western R.R.—Abandonment,* served November 8, 1985 (unpublished) (purchase offer under § 10905 to purchase 114.51 miles of track), *pet. for review pending.*

Since the question of the validity of the ICC's narrow construction of Section 10905 is important to rail employees, RLEA has filed this brief in support of the petition by Mr. Simmons.

REASONS FOR GRANTING THE WRIT

The Decisions By The ICC And By The Seventh Circuit Have Decided An Issue Important To Rail Labor In A Manner Which Distorts The Intent Of Congress And Conflicts With Applicable Decisions By This Court Which Require That Remedial Legislation Be Construed Broadly So As to Achieve The Purposes For Which That Legislation Was Enacted

In the early 1940's, the ICC took the position that, since Congress did not include in the Interstate Commerce Act's abandonment provisions a specific requirement for employee protection, as it had done in the Act's consolidation provisions, the Commission did not have the authority to impose such provisions on an abandonment authorization. That position was rejected by this Court in *ICC v. RLEA,* 315 U.S. 373 (1942), when this Court, after reviewing the statutory language, stated that: "The phrase 'public convenience and neces-

sity' [which governed abandonment requests] no less than the phrase 'public interest' [which governed consolidation requests] must be given a scope consistent with the broad purpose of the Transportation Act of 1920: to provide the public with an efficient and nationally integrated railroad system." 315 U.S. at 376-77. This Court then concluded that, since the just and fair treatment of railroad employees promotes that national interest, the Commission had the authority to protect railroad employees who may be affected by abandonments, even though Congress did not specifically require such protection. 315 U.S. at 377-78. Once this Court corrected the ICC's views as to its authority, the Commission adopted the policy of imposing employee protection in all abandonment authorizations, except those involving the abandonment of an entire line. *E.g., Chicago, Burlington & Quincy R.R.—Abandonment,* 257 I.C.C. 700 (1944).

While it was in this frame of mind, the Commission viewed abandonment/discontinuance transactions realistically and would impose an employee protection obligation even where the end result of the transaction was the sale of the line; according to the Commission, it viewed the effect on the employees as being the important criteria, for form should not govern over substance. As the Commission stated:

> While the Commission is not required by statute to impose labor protective conditions in proceedings where newly formed noncarriers will become carriers through the acquisition and operation of lines of railroad as here, it does have the discretion to do so where the interests of employees may be adversely affected by the proposal. In *Prarie* [*sic*] *Trunk Railway—Acquisition and Operation,* 348 I.C.C. 832 (1977) and *Cadilac* [*sic*] *& Lake City Ry. Co. Acquisition and Operation,* 320 I.C.C. 617 (1964), the Commission imposed such conditions, with the costs to be borne by the selling carrier. In both cases, the vendors had filed abandonment applications for the rail lines in question, but those applications were dismissed. Notwithstanding the dismissal of the abandonment applications, the Commission, in each

> case, noted that the principle result or benefit of the proposal would be the cessation by the vendor of operation of the line. Since employees of the vendors would be affected by the proposal and since each vendee was a new carrier that had not operated previously, the Commission imposed the burden of labor protection costs upon the vendors . . . .

Durango & Silverton Narrow Gauge R.R.—Acquisition and Operation, 363 I.C.C. 292, 295 (1979).

Consequently, when Section 10905's predecessor, Section 1a(6), was first added to the Interstate Commerce Act in 1976, the Commission had an established policy of imposing em-employee protection where the substance of a transaction involved an abandonment or discontinuance, even though the line involved was being sold for continued rail operations.

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31, which, as relevant to this case, amended the Interstate Commerce Act in two respects. First, Section 802 of the 4R Act modified substantially the abandonment provisions of the Act and added the requirement in what is now 49 U.S.C. § 10903(b)(2) that abandonments, which are to be authorized by a certificate, shall be conditioned by "provisions for the protection of the interests of employees." Consequently, the 4R Act modified prior law by making employee protection mandatory, and not discretionary, in abandonment cases. *See,* H. Rpt. No. 94-781, 94th Cong., 2d. Sess. at 218-19 (1976). And second, that same section of the 4R Act added a new provision to the abandonment section which, in effect, codified the ICC's past practice of encouraging the sale or continued operation of a rail line which a railroad wished to abandon. That provision became Section 1a(6) of the Interstate Commerce Act and was subsequently recodified as Section 10905 in 1978 by the recodification statute, Pub. L. No. 95-473, 92 Stat. 1337. Prior to 1980, the ICC did not view Section 10905, or its predecessor Section 1a(6), as overruling its prior practice of imposing employee protection in abandonment-sale cases. *See, Abandonment of Railroad Lines And Discontinuance of Service,* 354 I.C.C. 252, 270 (1976).

Four years after the 4R Act was signed into law, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, which modified Section 10905 in several respects. Section 402 of the Staggers Rail Act repealed existing Section 10905 and replaced it with a new section which

> creates a mechanism that requires railroads to sell a railroad line approved for abandonment to a financially responsible party if the financially responsible party has offered to pay the acquisition cost of the line or the difference between the revenues attributable to providing that service plus a reasonable return on the value of the line. Section 202 also requires rail carriers petitioning for abandonment of a railroad line to provide interested parties an estimate of the subsidy or the minimum purchase price required to keep the line in operation, calculated in accordance with the new provisions in 49 U.S.C. 10905.
>
> The provisions in section 202 assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process.

Conference Report, H. Rpt. No. 96-1430, 96th Cong., 2d Sess. at 125 (1980).

Amended Section 10905 essentially followed the scheme of the 4R Act, modified to shorten the time periods and to add a procedure whereby the ICC was given the authority to establish "the price and other terms of the sale" in those cases where the parties were unable to reach an agreement. 49 U.S.C. § 10905(f)(1)(C). Moreover, new Section 10905 provided that: "If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance." 49 U.S.C. § 10905(e). That provision modified former Section 1a(6)(a) which had provided that: "Upon notification to the Commission of the execution of such assistance or acquisition

and operating agreement, the Commission shall postpone the issuance of such a certificate for such period of time as such an agreement . . . is in effect."

When the Commission addressed the question of whether employee protection could be imposed in connection with a Section 10905 sale, it concluded that "the applicable statutes neither require nor permit us to do so" for several reasons. Appendix to Petition at 28a. First, the ICC noted that while Section 10905 "is silent on the issue of labor protection" (*id.*), the specific language of the statute required the approval of a sale agreement and the dismissal of the abandonment application. Consequently,

> all conditions qualifying our approval of the abandonment (including labor protection, public use and environmental conditions) must be dismissed as well. In light of the specific directions of the statute, it is inappropriate to find that Congress empowered the Commission to require labor protections under 49 U.S.C. 10905.

Appendix at 28a. That conclusion, the ICC believed, was fortified by the Staggers Rail Act itself, because, in that Act, "Congress gave labor issues intense scrutiny and enacted several express provisions which either required the Commission to impose labor protection or gave the Commission the discretion to impose labor protection." *Id.* "Because of these numerous express provisions for labor protection, it must be presumed that by omitting any similar provisions in 49 U.S.C. 10905, Congress did not intend this power to exist." Appendix at 29a. And finally, the ICC stated that it had issued "many decisions" under Section 10905 which did not include employee protection,[5] and since Congress did not take corrective action, it must be presumed that the ICC's failure to protect employees is what Congress intended. Appendix at 29a-30a.

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[5] Petitioner Simmons has disputed this point factually (*see, Simmons* Reply Br. in 7th Cir. No. 84-1352 at 16 n.25), and in light of the ICC's failure to report those cases in its Annual Reports to Congress (*see*, page 5, *supra*), it is frivolous to assert that Congress failed to take corrective action, for it does not appear that there was any need to take corrective action until the cases at bar.

That conclusion was upheld by the Seventh Circuit in the two *Simmons* cases because the court believed that it was required to give great weight to the ICC's interpretation of its governing statute; the court added that the "Commission's interpretation of section 10905 is reasonable, and we think correct." Appendix at 4a; *see also, id.* at 21a. According to the court of appeals in *Simmons I,* the statute "says nothing about labor-protective conditions and, what is more important, contains no suggestion that the Commission has discretion to impose conditions of any sort on transactions within the statute's scope . . . ." Appendix at 4a. Since Section 10905, unlike other sections of the Act, did not authorize the ICC to impose "such terms and conditions as in its judgment the public convenience and necessity may require," the court concluded that *ICC v. RLEA, supra,* was inapposite and that: "Against this background, the silence of section 10905 on the matter of conditions has a certain eloquence, especially when we consider the active participation of the railroad unions in revisions of the Interstate Commerce Act." Appendix at 5a. *Simmons II* built upon that silence and stated: "When the silence of § 10905 is considered in the light of the extensive consideration given to labor protection in the Staggers Act and the provisions of that Act that refer specifically to employee protection, we cannot say that the Commission's interpretation is unreasonable." Appendix at 21a.

RLEA respectfully submits that in reaching their conclusion that Congress intended to deprive employees of protection in Section 10905 sales, both the ICC and the Seventh Circuit ignored the principles which this Court expressed in *ICC v. RLEA, supra,* and approached the question posed by this case backwards. Instead of asking whether Congress intended to change past practice and prohibit the imposition of employee protection, respondent ICC and the court of appeals placed the burden on the employees and required them to show that Congress specifically intended to impose an employee protection requirement in Section 10905. Here, the Commission, in compliance with Section 10903(b)(2), had imposed employee protections on the abandonment authorizations at issue, and, thus, the question which should have been addressed by the ICC and by the Seventh Circuit was whether those protections

imposed upon the abandonment were abrogated or otherwise cancelled by Section 10905. By imposing the burden on the employees, the ICC and the court of appeals decided an important issue of law in a manner contrary to applicable decisions of the Court.

This Court has long recognized that remedial statutes are to be construed broadly so as to effectuate the purpose for which they were enacted. *E.g., Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967); *Piedmont & Northern Ry. v. ICC,* 286 U.S. 299 (1932). Section 10903's employee protection requirement is clearly a remedial statute and must be construed broadly. *ICC v. RLEA, supra,* 315 U.S. at 376. However, in the cases at bar, neither the ICC nor the Seventh Circuit attempted to read Section 10903(b)(2) broadly.

This Court has previously condemned such a narrow approach to the employee protection question in *RLEA v. ICC, supra,* when the ICC argued, as it does now, that Congress' addition of a specific employee protection requirement in one section of the Interstate Commerce Act negated its implied existence in another; as this Court stated:

> Nor is the petitioners' contention strengthened because Congress did modify § 5(4) in the Transportation Act of 1940. The modifications, so far as relevant here, merely made mandatory with respect to unifications the protections for workers that had previously been discretionary.... To regard them as a restriction on the discretionary power of the Commission with respect to abandonments is not merely illogical. It requires us to impute to Congress a policy of mandatory protection for labor in unifications and no protection at all in abandonments. It is reasonable to suppose that if Congress had intended to make such a distinction, it would have said so more explicitly.

315 U.S. at 379-80 (footnote omitted).

That logic, RLEA respectfully submits, is clearly applicable here. However, the ICC's and the Seventh Circuit's approach to the cases at bar ignored that teaching and used a flawed approach to reach a result which is blatantly false.

According to respondent ICC and to the Seventh Circuit, Congress' silence on the issue of employee protection in Section 10905 sales must be presumed to be a disapproval of such protections because of Congress' expressed concern for labor in other sections of the Staggers Rail Act. That illogic ignores *ICC v. RLEA, supra,* and *United States v. Lowden, supra,* and reaches a conclusion as to legislative intent which is in reality an effort to rationalize the result reached, rather than being an attempt to find the result which Congress intended.

When Congress was considering the legislation which eventually became the Staggers Rail Act, the Senate stated that the goal of its bill "is to allow for the restoration of the rail industry to vigorous and profitable growth." S. Rpt. No. 96-470, 96th Cong., 1st Sess. at 6 (1979). The Senate Committee on Commerce, Science, and Transportation added: "The Committee believes this goal need not be achieved to the detriment of rail labor, shippers, intermodal competitive relationships which foster healthy competition, or any other interest group." *Id.* Section 10905's amendments were included in the Senate Bill (S. 1946, 96th Cong., 1st Sess.) reported out by the above quoted Senate Committee report, and even a cursory review of the final bill shows that Congress did not deviate from its goal to achieve reform without affecting employee interests adversely. Indeed, the Staggers Rail Act is virtually unparalleled in the lengths to which Congress went to protect employees from bearing the costs of deregulating the rail industry. *See,* Pub. L. No. 96-448, *supra,* at §§ 213, 219(g), 221, 223, 226, 227, 401, and 701, 94 Stat. at 1913, 1926, 1931, 1939, and 1959-60.

To assert that Congress' silence in Section 10905 equals Congressional disapproval of employee protection in such cases is to ignore reality and the Act's legislative history, for the real answer to the lacuna upon which the Seventh Circuit so heavily relied is that there is no gap; Congress did not enact a specific employee protection requirement in Section 10905 because there was no need for such a provision since Section 10903(b)(2) mandated protection in abandonment cases and the ICC had previously acknowledged that such protections applied even where the line was sold under Section 10905. *Abandonment of Railroad Lines and Discontinuance of Service,*

supra, 354 I.C.C. at 270. This conclusion is fortified by the testimony of both the ICC and RLEA before Congress during Congress' consideration of the bill which eventually became the Staggers Rail Act.

ICC Chairman A. Daniel O'Neal testified before the Senate Committee on Commerce, Science, and Transportation on November 7, 1979, when the Senate Committee first began to consider S. 1946. Chairman O'Neal supported S. 1946's amendments to Section 10905 but did not indicate in his testimony that the amendments would change existing law by depriving employees of protection. *Hearings on S. 1946, Before the Senate Committee on Commerce, Science, and Transportation,* 96th Cong., 1st Sess. at 107, 131 (1979). RLEA also testified before that same Committee, but on November 13, 1979. *Id.* at 536. Rail labor proposed an amendment to Chapter 109 of the Interstate Commerce Act which, if accepted, would have made employee protection mandatory in all cases under Chapter 109 or involving forced reciprocal switching. *Id.* at 544. Counsel for RLEA explained labor's proposal as follows:

> [RLEA's proposal, which included deleting the protection in 49 U.S.C. § 10903(b)(2)] would provide that same protection for all of the provisions in that title, as well as for employees who might be affected by directed, required reciprocal switching agreements.
>
> Now what that does really is give the employees just exactly what they have now, except in reciprocal switching agreements where those are directed, and in some cases where carriers extend their lines and affect employees that would be protected.

Id. at 539. While Congress did not enact RLEA's proposed provision, it did accept the substance of that proposal and it enacted discretionary protection for employees affected by reciprocal switching (Staggers Rail Act § 223, 94 Stat. 1929) and by extensions of lines (*Id.* at § 221, 94 Stat. 1928). As this Court explained before:

> [T]he contrary conclusion—that abandonments [here, § 10905 sales] were now to be distinguished, although the Commission had made no such distinction in presenting the problem to Congress and

> that Congress approved such a distinction—is at best the product of a set of inferences none of which is free from doubt.

ICC v. RLEA, supra, 315 U.S. at 379.

Although this Court requires federal courts to give due deference to an administrative agencys' construction of its own governing statute (*e.g., Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. ____, 104 S.Ct. 2778, 81 L.Ed. 694 (1984)), that deference "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 318 (1965). Unfortunately, that is exactly what has occurred in the cases at bar because the Seventh Circuit permitted the ICC, in the guise of "filling the gap," to distort Congress' intent, to ignore prior decisions by this Court, and to reach a result which all rail employees know was never intended by Congress but which comports with the ICC's post-Staggers Act open antipathy towards employee rights and employee protection.

CONCLUSION

For the reasons set forth above, RLEA respectfully submits that the petition should be granted.

Respectfully submitted,

JOHN O'B. CLARKE, JR.

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorney for Railway Labor Executives' Association as *Amicus Curiae*

Date: December 18, 1985

APPENDIX A

Railway Labor Executives' Association Member Organizations

American Railway & Airway Supervisors Association (Division of BRAC);

American Train Dispatchers Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood of Railway & Airline Clerks;

Brotherhood Railway Carmen of the U.S. and Canada;

Hotel & Restaurant Employes & Bartenders International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers & Blacksmiths;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen and Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America;

Seafarers International Union of North America;

Sheet Metal Workers International Association;

Transport Workers Union of America; and

United Transportation Union.